BMITTED

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1925

No. [redacted] 205

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY AND UNITED STATES FIDELITY AND GUARANTY COMPANY, PLAINTIFFS IN ERROR,

vs.

THE STATE OF OKLAHOMA AND THE CITY OF McALESTER, OKLAHOMA

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

FILED NOVEMBER 17, 1924.

(30,694)

(30,694)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 729

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY AND UNITED STATES FIDELITY AND GUARANTY COMPANY, PLAINTIFFS IN ERROR,

vs.

THE STATE OF OKLAHOMA AND THE CITY OF McALESTER, OKLAHOMA

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 18, 1924

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[fol. 1] **IN SUPREME COURT OF OKLAHOMA**

RETURN TO WRIT OF ERROR

UNITED STATES OF AMERICA,
Supreme Court of Oklahoma, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of the said Supreme Court of Oklahoma, in the City of Oklahoma City, this 28th day of October, A. D., 1924.

Wm. M. Franklin, Clerk Supreme Court of Oklahoma, by Reuel Haskell, Jr., Assistant. (Seal of Supreme Court, State of Oklahoma.)

Costs of suit:

Plaintiff's costs, $— paid by City of McAlester, Okla.

Defendant's costs, $40.00, paid by Missouri, Kansas & Texas Railway Company.

Costs of Transcript, $34.10, paid by Missouri, Kansas & Texas Railway Company.

Wm. M. Franklin, Clerk Supreme Court of Oklahoma, by Reuel Haskell, Jr., Assistant. (Seal of Supreme Court, State of Oklahoma.)

[fol. 2] CITATION—In usual form, showing service on E. S. Ratliff et al.; filed Oct. 21, 1924; omitted in printing

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[fol. 3] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, and UNITED STATES Fidelity and Guaranty Company, Appellants and Plaintiffs in Error,

versus

THE STATE OF OKLAHOMA and THE CITY OF MCALESTER, OKLAHOMA, Appellees and Defendants in Error

PETITION FOR AND ORDER ALLOWING WRIT OF ERROR—Filed Oct. 21, 1924

Considering themselves aggrieved by the final decision of the Supreme Court of the State of Oklahoma in rendering judgment

against them in the above entitled case affirming the order of the Corporation Commission appealed from therein, the appellants and plaintiffs in error hereby pray a writ of error from said decision and judgment to the United States Supreme Court and an order fixing the amount of a supersedeas and cost bond and appellants and plaintiffs in error present herewith their assignments of error and pray that a duly authenticated transcript of the record, proceedings and papers herein may be sent to the United States Supreme Court.

Joseph M. Bryson, Maurice D. Green, Howard L. Smith, Attorneys for Appellants and Plaintiffs in Error.

STATE OF OKLAHOMA,
Supreme Court, ss:

Allowed: let the writ of error issue upon the execution and filing of a bond by the appellants and plaintiffs in error to the appellees and defendants in error in the sum of 1,000.00 ($1,000.00) Dollars, such bond, when approved, to act as a supersedeas and cost bond.

Dated this 21 day of October, 1924.

N. E. McNeill, Chief Justice of the Supreme Court of the State of Oklahoma.

Attest: Wm. M. Franklin, Clerk Supreme Court, Okla., by Reuel Haskell, Jr., Asst. (Seal of Supreme Court, State of Oklahoma.)

[fol. 4] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

WRIT OF ERROR—Filed Oct. 21, 1924

The President of the United States of America to the Honorable the Justices of the Supreme Court of the State of Oklahoma, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Oklahoma, before you or some of you being the highest court of law or equity in said State, in which a decision could be had in said suit between Missouri, Kansas & Texas Railway Company and United States Fidelity and Guaranty Company, as appellants and plaintiffs in error, and the State of Oklahoma and the City of McAlester, Oklahoma, as appellees and defendants in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of and being repugnant to the Constitution, Treaties, or Laws of the United States, and the decision was in favor of their validity; a manifest error hath happened, to the great damage of said Missouri, Kan-

sas & Texas Railway Company and United States Fidelity and Guaranty Company, appellants and plaintiffs in error, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

[fol. 5] Witness the Honorable William H. Taft, Chief Justice of the Supreme Court of the United States this 21 day of October, in the year of our Lord, one thousand nine hundred twenty-four.

Harry L. Finley, Clerk of the District Court of the United States for the Western District of the State of Oklahoma. (Seal of the United States District Court, Western District of Oklahoma.)

Allowed October 21, 1924, by N. E. McNeill, Chief Justice of the Supreme Court of the State of Oklahoma.

Attest: Wm. M. Franklin, Clerk Supreme Court, Okla., by Reuel Haskell, Jr., Asst. (Seal of Supreme Court, State of Oklahoma.)

[fol. 6] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

ASSIGNMENTS OF ERROR—Filed Oct. 21, 1924

Come now the Missouri, Kansas & Texas Railway Company and United States Fidelity and Guaranty Company, plaintiffs in error in the above entitled cause, and ever and show that in the foregoing record and proceedings in said cause, there is manifest error in the action and rulings of the Corporation Commission of Oklahoma and the Supreme Court of the State of Oklahoma in this, to-wit:

I

The Corporation Commission of Oklahoma and the Supreme Court of Oklahoma had no jurisdiction or authority to impose upon the plaintiffs in error any requirements or condition other than or different from those contained in the Ordinance No. 74, passed and ap-

proved November 8, 1901, constituting the contract between the City of McAlester, Oklahoma and these plaintiffs in error, by which contract it was provided, among other things, that if at any time in the future the said City of McAlester should desire to open and establish a crossing of Comanche Avenue across the right of way and station grounds of the plaintiffs in error that it might do so by an undergrade crossing under the main and other tracks of said plaintiffs in error located upon their fill and above the then existing grade of said Comanche Avenue, and by a grade crossing over any side track of these plaintiffs in error then existing, or thereafter established, said crossing to be constructed upon plans and specifications to be approved by the plaintiffs in error and at the sole cost and expense of the said City of McAlester, the said plaintiffs in error agreeing, in consideration thereof and in consideration of the other matters and things expressed in said ordinance, to waive any and all claims for damages because of the opening and establishing of said crossing, and the Supreme Court of Oklahoma erred in affirming the order of the Corporation Commission of Oklahoma of June 16, 1922, and denying plaintiffs in error's petition for rehearing, by which order of the [fol. 7] Corporation Commission said plaintiff in error Railway Company was ordered and directed to prepare a plan for an undergrade crossing of Comanche Avenue over its premises as prayed for by said City of McAlester, and as stated in said order, together with an estimated cost showing quantities, same to be filed with the Mayor of said City and with the Corporation Commission within a specified time, as stated in said order; and by which order said plaintiff in error Railway Company was further ordered and directed to undertake to agree with said City of McAlester on an apportionment of the cost of constructing said undergrade crossing and on failure to agree, to report back to said Corporation Commission for hearing of further evidence covering a division between said Railway Company and said City of the cost thereof; and by which said order said plaintiff in error Railway Company was ordered and directed to have said undergrade crossing constructed and opened for traffic within ninety days from the date said City of McAlester should arrange to pay its proportionate part of the cost of constructing the same; the said order and the said decision of the Supreme Court in affirming same and denying plaintiffs in error a rehearing constituting a taking of these plaintiffs in error's property without due process of law, and without compensation, and denying to them the equal protection of the law, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

II

The Corporation Commission of Oklahoma and the Supreme Court of Oklahoma had no jurisdiction or authority to impose upon the plaintiffs in error any requirements or condition other than or different from those contained in the Ordinance No. 74, passed and approved November 8, 1901, constituting the contract between the City of McAlester, Oklahoma, and these plaintiffs in error, by which contract it was provided, among other things, that if at any time in the

future the said City of McAlester should desire to open and establish a crossing of Comanche Avenue across the right of way and station grounds of the plaintiff in error Railway Company, that it might do so by an undergrade crossing under the main and other tracks of said plaintiff in error located upon its fill and above the then existing grade of said Comanche Avenue, and by a grade crossing over any side track of these plaintiffs in error then existing, or thereafter estab-
[fol. 8] lished, said crossing to be constructed upon plans and specifications to be approved by the plaintiffs in error and at the sole cost and expense of the said City of McAlester, the said plaintiffs in error agreeing, in consideration thereof, and in consideration of the other matters and things expressed in said ordinance, to waive any and all claims for damages because of the opening and establishing of said crossing, and the Supreme Court of Oklahoma erred in affirming the order of the Corporation Commission of June 16, 1922, and denying plaintiffs in error's petition for a rehearing, by which order of the Corporation Commission said plaintiff in error Railway Company was ordered and directed to prepare a plan for an undergrade crossing of Comanche Avenue over its premises as prayed for by the said City of McAlester, and as stated in said order, together with an estimated cost showing quantities, same to be filed with the Mayor of said City and with the Corporation Commission within a specified time, as stated in said order; and by which order said plaintiff in error Railway Company was further ordered and directed to undertake to agree with said City of McAlester on an apportionment of the cost of constructing said undergrade crossing and on failure to agree, to report back to said Corporation Commission for hearing of further evidence covering a division between said Railway Company and said City of the cost thereof; and by which said order said plaintiff in error Railway Company was ordered and directed to have said undergrade crossing constructed and opened for traffic within ninety days from the date said City of McAlester should arrange to pay its proportionate part of the cost of constructing the same; said order and the decision of the Supreme Court in affirming same and denying plaintiffs in error a rehearing resulting in a denial to these plaintiffs in error of the right of contract, and impairing the obligations of contracts, in violation of Section 10, of Article I of the Constitution of the United States of America.

III

The Supreme Court of Oklahoma erred in upholding and affirming the order of the Corporation Commission of Oklahoma on the ground that said Commission had authority and jurisdiction to make said order under the provisions of Sections 3491 to 3497, both inclusive of the Compiled Oklahoma Statutes of 1921, and in holding the said statutes to be valid and Constitutional, the validity of said sections and the jurisdiction and authority exercised thereunder by the Cor-
[fol. 9] poration Commission and the Supreme Court in this cause having been drawn in question by these plaintiffs in error on the ground of their being repugnant to the Constitution of the United States and in contravention thereof, in that they result in the taking

of these plaintiffs in error's property without due process of law and without compensation, and denied to them the equal protection of the law, in violation of the Fifth and Fourteenth Amendment- to the Constitution of the United States, and deny to them the right of contract, and impair the obligation of contracts, in violation of Section 10 of Article I of the Constitution of the United States.

Wherefore, for these and other manifest errors appearing in the record, the said Missouri, Kansas & Texas Railway Company and United States Fidelity & Guaranty Company, plaintiffs in error, pray that the said judgment of the Supreme Court of the State of Oklahoma be reversed, set aside and held for naught, and that judgment be rendered for these plaintiffs in error, granting to them their rights under the Constitution and laws of the United States, and for their costs.

Joseph M. Bryson, Maurice D. Green, Howard L. Smith, Attorneys for Plaintiffs in Error.

[fols. 10 & 11] SUPERSEDEAS AND COST BOND ON WRIT OF ERROR FOR $1,000—Approved and filed Oct. 23, 1924; omitted in printing

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[fols. 12 & 13] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the Supreme Court of the State of Oklahoma:

You are requested to at once prepare a complete copy of the record in the above entitled and numbered cause, including copies of all papers filed and all proceedings had in the Supreme Court of the State of Oklahoma, together with the opinion of the court and the petition for rehearing of appellants and plaintiffs in error herein, and the order overruling same, in compliance with the writ of error from the United States Supreme Court heretofore filed herein.

Joseph M. Bryson, Maurice D. Green, Howard L. Smith, Attorneys for Appellants and Plaintiffs in Error.

STATE OF OKLAHOMA,
Oklahoma County, ss:

Service of the above and foregoing praecipe for record and receipt of a copy thereof is hereby acknowledged this 21st day of October, 1924.

E. S. Ratliff, Atty. for Corp. Com., Attorneys of Record for Appellee and Defendant in Error, State of Oklahoma.

STATE OF OKLAHOMA,
Pittsburg County, ss:

Service of the above and foregoing praecipe for record and receipt of a copy thereof is hereby acknowledged this 24th day of October, 1924.

W. J. Horton, Attorney of Record for Appellee and Defendant in Error, City of McAlester, Oklahoma.

[fol. 14] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

PETITION IN ERROR—Filed Nov. 27, 1922

The said appellant above named alleges and shows to this Honorable Court that on the 16th day of June, 1922, the appellees herein obtained a final judgment and order against this appellant before the Corporation Commission of the State of Oklahoma by the consideration of said Commission in a certain action pending before it, wherein said appellees were complainants and this appellant was defendant by the terms and provisions of which final order and judgment this appellant was ordered, directed and required by said Commission to prepare a plan for a subway crossing of Comanche Avenue under and across appellant's premises at McAlester, Oklahoma, as prayed for by appellees, together with an estimate of the costs thereof and appellant and the City of McAlester were ordered to undertake to agree on an apportionment of the costs thereof and appellant was required to have said underhead crossing completed and opened for traffic within ninety (90) days from the date the said City of McAlester had arranged to pay its portion of the costs, notwithstanding the fact that the right to effect such an extension of Comanche Avenue under and across appellant's premises has never yet been secured by condemnation proceedings, or otherwise, except that by contract Ordinance No. 74 of the City of McAlester, passed and approved on November 8th, 1901, it is provided that if said Avenue should ever be opened and established across appellant's premises, it would be done by an underhead crossing under the main track and a grade crossing over the side tracks of appellant on plans to be approved by it, but at the sole costs and expense of the City of McAlester, and also notwithstanding the fact that there is [fol. 15] now no reasonable necessity for said crossing; the original case-made and transcript of the record of which said judgment, order and proceeding had in said cause, together with the further order of the said Corporation Commission denying appellant's application for a supersedeas is attached hereto and made a part of this petition in error, and appellant alleges and states that there is error in said judgment, order and proceedings in this, to-wit:

1

That the Corporation Commission of Oklahoma had no jurisdiction over such proceedings or to make the order complained of.

2

That the Corporation Commission of Oklahoma had no jurisdiction to require the opening and establishment of Comanche Avenue over appellant's premises in the absence of any right by condemnation proceedings, or otherwise, having been required to do so.

3

The Corporation Commission of Oklahoma had no jurisdiction to impose upon appellant any requirements or conditions other than, or different from, those agreed to in contract Ordinance No. 74 of the City of McAlester, passed and approved on November 8th, 1901.

4

The Corporation Commission of Oklahoma erred in ignoring and treating as null and void and of no effect, the said contract between the City of McAlester and appellant as represented by said Ordinance No 74.

5

The order of the Corporation Commission results in a taking of appellant's property without due process of law and without compensation and denies it the equal protection of the law in violation of the fifth and fourteenth (5th & 14th) Amendments to the Constitution of the United States, and of Sections seven and twenty-four, Article two of the Constitution of the State of Oklahoma.

[fol. 16]

The order of the Corporation Commission denies to appellant the right of contract and impairs the obligation of contracts, in violation of Section Ten of Article One of the Constitution of the United States and in violation of the Constitution of the State of Oklahoma.

7

The order of the Corporation Commission is unreasonable and unjust and an abuse of discretion on the part of the Commission.

8

The order of the Corporation Commission is unreasonable and unjust in that there is no showing of any necessity for the crossing in question.

9

The Corporation Commission erred in refusing to permit appellant in error to supersede the order of the Commission, pending this appeal, and the right to supersede said order is guaranteed by the Constitution of Oklahoma and is not subject to the discretion of the Commission.

Wherefore appellant prays that this Court review said order and proceedings and each and every one of the assignments herein and that said assignments be sustained and that said orders and proceedings be vacated and set aside and held for naught and reversed and that judgment may be rendered in favor of appellant and that such further orders and judgments be rendered in said cause as to this Court may seem proper and that appellant be restored to all the rights which it has lost.

M. D. Green and H. L. Smith, Attorneys for Appellant.

[fol. 17] [File endorsement omitted.]

BEFORE THE CORPORATION COMMISSION OF OKLAHOMA

Cause No. 4410

THE INCORPORATED CITY OF MCALESTER, OKLAHOMA, Petitioner,

vs.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY and CHAS. E. Schaff, as Receiver of the Missouri, Kansas & Texas Railway Company, Respondents.

Case Made—Filed in Supreme Court Nov. 27, 1922.

[Caption omitted]

[fol. 18] [Title omitted]

APPLICATION FOR ORDER TO CONSTRUCT PUBLIC HIGHWAY CROSSING—Filed Nov. 27, 1922

Comes now the Incorporated City of McAlester, Oklahoma, petitioner herein, and complaining of the Missouri, Kansas & Texas Railway Company and Chas. E. Schaff as its receiver operating its properities, respondents, says:

That the petitioner, the incorporated city of McAlester, Oklahoma, is a municipal corporation and a city of the first class organized as such under the laws of the state of Oklahoma and laid

out into city blocks, lots, streets and alleys according to the official map and plat thereof approved by the Acting Secretary of the Interior, February 14, 1901, under authority of the laws of the United States; that it is also divided into six wards numbered First, Second, Third, Fourth, Fifth and Sixth Wards, with city public schools in each ward and a high school in the First Ward; that it has a population of over — inhabitants, with residence and wholesale and retail business districts; with railroads and union passenger and freight depots, street car lines and interurban lines.

That Comanche Avenue is one of the public streets and highways [fol. 19] of said City of McAlester appearing on said map and plat of said city and extends in an east and west direction from the Second Ward to the Third Ward of said city, and that the city public school of the Third Ward is located thereon, and that the Second and Third Wards contain a large population rendering free and unobstructed passageway along said Comanche Avenue highly necessary to the convenience and necessities of the residents of said Wards and of said city.

That the said Missouri, Kansas & Texas Railway Company is a steam railway, and that said Chas. E. Schaff is the Receiver of its properties operating the same, and that the said steam railway in passing through the city in a north and south direction separates the Second Ward, lying on its east, from the Third Ward, lying on the west line thereof, and that said Comanche Avenue crosses the right of way of said railway company, but that at the point of its intersection therewith there exists a very high embankment, upon the top of which is situated the tracks and road bed of the said railway line, by reason whereof said Comanche Avenue is completely closed and obstructed at said point.

That the City Council of the said city of McAlester, Oklahoma, on September 19, 1921, enacted and passed a resolution declaring the necessity for a crossing upon, over or under the track, road bed and right of way of said Missouri, Kansas & Texas Railway Company where said Comanche Avenue intersects therewith, and by said resolution directed that application be made to said Corporation Commission for an order requiring said Missouri, Kansas & Texas Railway Company and said Chas. E. Schaff, its Receiver operating its properties, to construct and maintain a public highway crossing at said intersection, a copy of said resolution being hereto attached [fol 20] and made a part hereof and marked Exhibit "A."

Wherefore, the premises considered, the petitioner, the Incorporated City of McAlester, Oklahoma, prays that an order be made and entered by the Corporation Commission requiring said Missouri, Kansas & Texas Railway Company and its said Receiver, Chas. E. Schaff, to construct and maintain at its and his cost and expense a public highway crossing at the said intersection of said Comanche Avenue with said steam railway company in such manner as to open the same for passageway and travel by pedestrians and vehicles along and over said Comanche Avenue.

The Incorporated City of McAlester, Oklahoma, by W. J. Horton, City Attorney, and E. M. Fry, City Manager.

[fol. 21] Resolution

Whereas, Comanche Avenue is one of the public highways and streets of the Incorporated City of McAlester, Oklahoma, and one of the main thoroughfares and highways connecting and between the Second and Third Wards of said city, each of said wards containing a large population, and having located in each of them public schools of the city, the public school of the Third Ward being located on said Comanche Avenue, and the said Comanche Avenue running through the central portions of said Second and Third Wards; and, whereas, there exists at the intersection of said Comanche Avenue and the roadbed, tracks and right of way of the Missouri, Kansas & Texas Railway Company, a steam railway company, a very high embankment which completely obstructs passageway along said Comanche Avenue between the said Second and Third Wards and many other portions of said city, thereby greatly impeding the travel in said city and access of citizen to and from different points therein and communication with each other, and retarding the improvement and development of said city; and, whereas, by reason of the premises a public necessity exists for a crossing upon, over or under the said track, roadbed and right of way of said Missouri, Kansas & Texas Railway Company where said Comanche Avenue intersects therewith—

Now, therefore, be it resolved by the Mayor and City Council of the City of McAlester, Oklahoma, that the said City of McAlester make application to the Corporation Commission of the State of Oklahoma for an order requiring said Missouri, Kansas & Texas Railway Company and Chas. E. Schaff, its Receiver operating its properties, to construct and maintain a public highway crossing at [fol. 22] the intersection of Comanche Avenue with the tracks of said railway company as aforesaid; and that the City Manager and the City Attorney of said city are hereby directed, authorized and empowered to, for and in the name of said city to make such application to said Corporation Commission and to do all acts and things necessary and proper in and about the presentation and prosecution of said application.

Passed and approved this 19th day of September, 1921.

P. K. Pemberton, Mayor.

Attest: Rose D. Ewens, City Clerk. (Seal.)
Exhibit "A."

Endorsements as follows: In the Matter of Application for Order to Construct Public Highway Crossing. (Note by Reporter:) No filing date shown on petition.

[fol. 23] Order Setting Cause and Notice Thereof

And, thereafter, to-wit: On the 4th day of October, 1921, the Commission set said cause down for hearing on the First day of Novem-

ber, 1921, at ten 'oclock A. M., due and proper notice being given to all interested parties by the Commission, said notices being in the words and figures as follows, to-wit:

[fol. 24] Cause No. 4410

October 4, 1921.

Mr. M. D. Green, Gen. Atty. M., K. & T. Railway Company, Muskogee, Oklahoma.

Dear Sir: Enclosed herewith find copy of application of the City of McAlester for an order requiring the M., K. & T. Railway Company to construct a public highway crossing at Comanche Avenue in the City of McAlester.

This is to advise that the matter has been docketed under the above cause number and set for hearing in Commission's Court Room, Oklahoma City, at ten o'clock A. M., November 1, 1921.

Very truly yours, —— ——, Chairman. C. N.

cc: Mr. Chas. E. Schaff, Rec'r M., K. & T. Railway Co., St. Louis, Missouri.

[fol. 25] Notices of Resetting Cause

And thereafter said cause was continued from November 1, 1921 to April 14th, 1922, due notice being given all parties interested, said notices being in the words and figures following:

[fol. 26] Cause No. 4410

April 3rd, 1922.

E. M. Fry, City Manager McAlester, Oklahoma; W. J. Horgon, City Attorney McAlester, Oklahoma.

Gentlemen: In re application of the City of McAlester for an order requiring the M., K. & T. Ry. Co., to construct a public highway crossing at Comanche Avenue in the City of McAlester.

You are advised that the above matter has this day been re-set for hearing at ten o'clock A. M. April 14th, 1922, at McAlester, Oklahoma.

Very truly yours, —— ——, Secretary. GFS.c.

[fol. 27] Cause No. 4410.

April 3rd, 1922.

M. D. Green, Gen'l Atty. M., K. & T. Ry. Co., Muskogee, Oklahoma; Chas. E. Schaff, Receiver M., K. & T. Ry. Co., St. Louis, Mo.

Gentlemen: This is to notify you that Cause No. 4410 application of the City of McAlester for an order to construct a public highway crossing at Comanche Avenue in the City of McAlester, Okla-

homa, has this day been re-set for hearing on April 14th, 1922, at McAlester, Oklahoma.

Please take note and be governed accordingly.

Very truly yours, —— ——, Secretary. GFS—c.

[fol. 28] And thereafter said cause was again continued from April 14th, 1922, until May 10th, 1922; due notices being given to all parties interested as appear from the following notices in the words and figures as follows:

[fols. 29 & 30] May 4, 1922.

Mr. R. M. Frye, City Manager, McAlester, Oklahoma.

DEAR SIR: This is to notify you the Commission has this date reset Cause #4410 for hearing at 10 o'clock A. M. on May 10th at McAlester, Oklahoma.

Please take note and govern yourself accordingly.

Yours truly, —— ——, Chairman. GFS:T.

cc.—W. J. Horton, City Attorney, McAlester, Oklahoma.

[fol. 31] Chairman Russell: Are we ready to proceed, Judge?

Mr. Horton: Yes, as soon as the city clerk brings the ordinance in.

Chairman Russell: All witnesses who will testify in this case might stand up and be sworn.

(Witnesses sworn.)

Chairman Russell: Call your first witness.

ROSE D. EWENS, called as a witness on behalf of the City of McAlester, having first been duly sworn, testified as follows:

Direct examination.

By Mr. Horton:

Q. You may state your name?

A. Rose D. Ewens.

Q. What official office, if any, do you hold in connection with the City of McAlester?

A. City Clerk.

Q. As such you are the recorder of the ordinances passed by the City Council of the incorporated city of McAlester, Oklahoma, and have them in your custody?

A. I have.

Q. Do the city records show the passage of an ordinance on September 19, 1921, with reference to a crossing over the road bed and right-of-way of the Missouri, Kansas & Texas Railway Company at Comanche Avenue in said city?

A. Yes sir, a resolution passed on that date.

Q. Have you the resolution before you,—a record of it?

A. I have.

[fol. 32] Q. Will you please read the *resolution*?

Chairman Russell: You have a copy of it Judge, for the Reporter?

Mr. Horton: We will introduce the copy of it.

Mr. Green: I would like to enter an objection to the introduction of the resolution for the reason that it purports to state that Comanche Avenue is already an existing street over the railway premises, which is not a fact.

Chairman Russell: Well, that might be shown by testimony not to be a fact, but as it is a resolution of the City Council it will be admitted for what it shows and if it does not show the facts, it can be corrected by rebuttal testimony.

Mr. Green: Our objection goes to this: That you couldn't put the burden of proof on us by introducing a resolution passed at a time when we were not present, and, so far as I know, passed without any investigation or without any facts before them to determine whether there is a street over the railway premises. We don't deny there is a street west of the railway premises, also east, but our position is, there never has been such a street over the railway premises at that point. We don't want to admit that.

Chairman Russell: The Commission will recognize there is no street over the railway at that point.

Mr. Green: If the Chairman please, I didn't mean to simply confine my objection to the fact there is no physical driveway existing [fols. 33 & 34] there, but as a legal proposition there never has been a street opened there by combination, agreement or any other procedure by which a street was opened over the railway premises. This railroad was built in the 70's under a land grant of Congress.

Chairman Russell: The resolution will be admitted and your exceptions will be noted.

Mr. Green: Note the exception.

Chairman Russell: And it will be subject to any rebuttal that may want to be offered.

Mr. Horton: If the Commission please, we will supply to the Reporter a copy of this resolution as a part of the record in the case.

Chairman Russell: That will be sufficient.

Mr. Horton: That is all with this witness. Mr. Fry take the stand.

(Witness excused.)

Said Exhibit "A" having been offered and received in evidence, a true, correct and complete copy of the same will be found on Page No. 113 of this record. Same being attached to Plaintiff's Petition in this Cause.

E. M. Fry, called as a witness on behalf of the City of McAlester, having first been duly sworn, testified as follows:

Direct examination.

By Mr. Horton:

Q. Your name is E. M. Fry?
A. Yes sir.
Q. The City of McAlester has a managerial form of Government and you are the Manager of the incorporated city of McAlester?
A. Yes sir.
[fol. 35] Q. The City Council of the City of McAlester on September 19, 1921, enacted and passed a resolution declaring the necessity for a crossing over and upon or under the right-of-way and road bed of the Missouri, Kansas & Texas Railway Company at Comanche Avenue and authorized and directed you as City Manager to apply to the Corporation Commission for an order providing for such crossing?
A. Yes sir.
Q. It is under authority of that resolution that this proceeding has been brought?
A. Yes sir.
Q. What is the approximate,—the City of McAlester is a city of the first class?
A. Yes sir, it is.
Q. What is its population, approximately?
A. Fifteen thousand, approximately.
Q. It consists of how many wards?
A. Six Wards.
Q. How does the M., K. & T. railway run through the town, from north to south or east to west?
A. It runs from north to south.
Q. It bisects the city into two parts?
A. Yes sir.
Q. Which wards lay on the east of the M., K. & T. Railway?
A. On the east of the railway?
Q. Yes sir.
A. The first, second and fifth.
Q. Which wards lay on the west of the M., K. & T. Railway?
A. The Third, fourth and fifth,—the sixth is on the east.
Q. The city is traversed also by the Chicago, Rock Island and [fol. 36] Pacific Railway?
A. It is.
Q. And it runs east and west?
A. Yes sir.
Q. Which wards lay on the north of the C., R. I. & P. Railway?
A. The first, fourth, fifth and sixth.
Q. And which on the south side?
A. The second and third wards lay on the south side.

Q. What is the relative position of the second ward to any other ward in the city?

A. The second ward is the largest ward in the city in point of population. I haven't the data as to the population of the city by wards.

Mr. Thompson: Could you give us your vote by wards?

A. I could get it for you.

Mr. Thompson: All right.

Mr. Thompson: Do you intend to introduce this map?

(Indicating map laying on the table.)

Mr. Horton: We probably will. Have you a map, a recognized map of the city of McAlester?

A. I have.

Q. That map was prepared by or under what authority and as of what date?

A. It is a copy of a map of the Secretary of the Interior, it shows the Surveyor's mark, "Kirkpatrick." It is an official map of the Department of the Interior, it hasn't a certificate on here though.

Q. It is approved by the Secretary of the Interior as of February 14, 1901?

A. No, that isn't it. The date is on there but there is no——

[fol. 37] Q. That is a copy of the map the same as is in general use in the transfer of property and recognized as a correct copy of the official map of the City of McAlester?

A. Yes sir.

Q. We offer copy of this map in evidence and ask to mark it (Interrupted).

Chairman Russell: It will be admitted and marked by the Reporter.

Q. (Attorney continuing:) —as Petitioner's Exhibit "B" and we will identify copy of the ordinance as Petitioner's Exhibit "A."

Chairman Russell: Wards five and six are what constitutes the old town?

Mr. Horton: The Exhibit "B" is a map of that part of the City of McAlester which was formerly the incorporated city of South McAlester as laid out by the Townsite Commissioner and approved by the Secretary of the Interior February 14, 1901, and embraces wards one, two, three and four of the present city. This map does not embrace wards five and six of the city?

A. No.

Q. That was formerly known as the incorporated city of McAlester, now referred to as North McAlester by way of proper designation? (Interrupted.)

A. It has been consolidated.

Q. (Continuing:) And by Act of Congress since that time, the two have been consolidated into one city?

A. Yes sir.

Q. Have you a map of that part known as North McAlester before you?

[fol. 38] A. I have.

Q. The Petitioners ask leave to have this map of North McAlester, that is the fifth and sixth wards, identified as Petitioner's Exhibit "C" and offer the same in evidence.

(Map so identified by the Reporter for identification.)

A. Exhibit "C" is a copy of the original map as certified to the Secretary of the Interior with the exception of changes in the names of certain streets, which are noted thereon; some of the names of the streets were similar to those in South McAlester and they changed, that is the only difference.

Q. I hand you a statement of the last municipal election held on April 4, 1922. I will ask you to examine that and state if that is a correct statement of the vote?

A. It is correct, as I remember it.

Q. Please give that in figures?

A. For each ward?

Q. Yes.

A. First Ward 588; Second Ward 932; Third Ward 345; Fourth Ward 595; Fifth Ward 166; Sixth Ward 277.

Q. Mr. Fry, there are public schools in each one of these wards?

A. Yes sir.

Q. Where is the high school of the city located?

A. The high school of the city is located in the first ward.

Q. The high school has pupils from each ward in the city has it?

A. Yes sir.

Q. Upon what street is the high school in the third ward located?

A. You mean the public school?

[fol. 39] A. I mean in the third ward.

A. It is located on Comanche Avenue. Do you want the other streets,—it occupies a block?

Q. Yes

A. (No response.)

Q. Where are the main business streets or places where merchants transact business and the people buy and trade, where is that located?

A. Most of those are in the first and second wards.

Q. Are there any stores at all in the third ward?

A. Not very many, there are some suburban stores there,—a few.

Q. What sort are they?

A. Neighborhood grocery stores,—I think there are two or three.

Q. They are very small?

A. Yes sir, they are very small.

Q. And only patronized by those in the surrounding blocks?

A. I think so, yes.

Q. And only sell groceries and such supplies as are used for daily consumption?

A. Yes sir, I think so.

Q. Where is the railway depot, both freight and passenger located?

A. They are on the east side of the M., K. & T. railway tracks. The passenger depot is in the second ward and the freight depot is in the first ward, I believe.

Q. The Rock Island freight depot is further up north?

A. In the second ward.

[fol. 40] Q. From the junction of the Katy and the Rock Island those are also in the second ward?

A. Yes sir.

Q. Is there a church located in the third ward?

A. I think there is a Cumberland Presbyterian Church in the third ward. It is a small church, I don't know whether they hold services there or not,—there is a building there.

Q. It has had in former years a scant membership but you don't know now whether it is——(Interrupted.)

A. I don't know whether they conduct services there now or not.

Q. Where is the main Presbyterian church of the city located?

A. In the second ward.

Q. I believe, also, there may be a Presbyterian church in the sixth ward up in old town, accommodating the people in what is known as north McAlester?

A. Yes sir.

Q. Is there a Baptist church in the city?

A. Yes sir.

Q. Where is it located?

A. It is located in the first ward.

Q. Is it your understanding that it has a large percentage of membership residing in the third ward?

A. I think so, I am not familiar with that however.

Q. Where is the Methodist church located?

A. It is located in the fourth ward.

Q. That is what is known as the South Methodist Church?

A. Yes and there is another Methodist Church located in the fifth ward and another in the first ward.

[fol. 41] Q. The main Methodist church, that is the Methodist Church North, is located in the first ward, is it not?

A. Yes sir.

Q. The Episcopalian is in the first ward?

A. Yes sir.

Q. And the Catholic church, also?

A. Yes.

Q. There is a Catholic school in the first ward, also, I believe?

A. Yes sir.

Chairman Russell: In the absence of any evidence to the contrary, the Commission will take notice of the custom of people to mingle to and fro in cities like this and attend all these institutions and their business as well.

Mr. Horton: That being the case, that would relieve us of making formal proof of any of those instances.

Q. Mr. Fry, I wish you would turn to Exhibit "B" and point out on there what streets south of the Rock Island railway there is any public crossings over the M., K. & T. railway?

A. The first crossing south of the Rock Island Railway is at Cherokee Avenue.

Q. How far south of the railway depot, the union depot that is there?

A. It is just one block.

Q. Then, where is the next crossing south of that?

A. The next crossing south of that is on Delaware.

Q. How far south is that?

A. That is 435 feet south of Cherokee.

[fol. 42] Q. Just one block?

A. It is a block and a half, the way the town is laid out it is 436 feet south of the crossing on Cherokee.

Q. At Delaware is the place where the "town branch," the main open storm sewers of the city passes?

A. Yes, the canal.

Q. What facilities are there for travel, for passing of travel, for people in cars or wagons or other vehicles at Delaware?

A. There are very poor facilities there. It is a narrow crossing under there,—I presume it is not over 20 feet. I don't remember of ever measuring it.

Q. It is not situated so they could very well pave it?

A. No.

Q. I believe this town canal pursues generally that course of Delaware street, clear down to the fourth ward?

A. Yes, in a general way it does.

Q. There has to be an under grade crossing or culvert or some other way, merely for the water to pass through there?

A. Yes sir.

Q. Then passing on south from Delaware, where is the next crossing?

A. The next crossing is at Ottawa Avenue, a distance of 1,569 feet.

Q. Is that an over-head or an under grade crossing?

A. That is a grade crossing.

Q. How many blocks and streets intervene between Delaware and Ottawa?

A. Four streets,—three between, that is right.—No, four is correct.

[fol. 43] Q. And that is a distance of——

A. 1,569½ feet.

Q. Then residents of any part of the third ward who reside south of Comanche Avenue must either go north to the grade crossing some 1,500 feet at Ottawa or else go north, either to the inadequate crossing at Delaware or passing still further north to Cherokee in order to go back and forth between those, in order to gain exit from the third ward?

A. Yes.

Q. That naturally results in a good deal of inconvenience and extra travel to those who desire to make such trips?

A. Yes, it necessarily would.

Q. Comanche Avenue, both on the east side and on the west side of the M., K. & T. has been built up into a regular residence street and occupied by residences in its proportionate part of the population of the second and third wards?

A. Yes, Comanche street is a residence street on both sides of the M., K. & T. right-of-way.

Q. Comanche Avenue then is inhabited and open through and through on both the east and the west sides of the M., K. & T. Railway?

A. It is, yes.

Q. There are no lines of projections showing a street across the railway?

A. There are no lines of projection in any part of the city.

Mr. Green: Do you contend that Comanche Avenue exists as a regular street across the railway premises.

Mr. Horton: Yes, we do. All it needs, just like any other street in [fol. 44] any other city is an opening there in order to connect the two ends of the streets. In other words, the removal of the obstruction would make it an open street both ways, that is what we are seeking in this matter.

Chairman Russell: The city's contention is that it should be an open street?

A. Yes sir.

Chairman Russell: But you would contend it never has been a traveled street?

A. No we don't contend that.

Mr. Green: Do you contend that by any authority of law it has ever been designated as a street on the railway premises?

Mr. Horton: Nothing further than is shown by the map and plat which was prepared under the Act of Congress of June, 1898, and the streets which have been laid out and by our passage of which is crossed only in part by obstructions of the railway and which the statutes of the State provide may be opened so as to make them open and traversable.

Mr. Green: By referring to the maps, you mean those you have introduced in evidence?

Mr. Horton: Yes sir.

Mr. Green: To make myself more clear. The law provides whenever a street or highway is opened through private property, whether a railroad or a farm, that company is entitled to compensation,—Now you don't contend it was ever lawfully opened over the railway premises,—the question of how much damage is another matter.

[fol. 45] Mr. Horton: This is not a condemnation proceeding. This city has been laid out legally by an Act of Congress and the streets have been set out and Comanche Avenue has been brought up to the railway and the railway there forms an obstruction to the free passage way through and through on Comanche Avenue and under authority of the statutes of the State of Oklahoma it should be opened so as to make it a continuous thoroughfare.

Mr. Green: You say the railway forms an obstruction on Comanche Avenue. Now do you contend Comanche Avenue exists as a legal street on the railroad premises?

Mr. Horton: Yes sir.

Mr. Green: By what authority?

Mr. Horton: By authority of the Act of Congress for laying those streets out. There are no lines of projection on the streets coming across the railway, either the Rock Island or the M. K. & T. but they should be projected across, they are supposed to run across.

Chairman Russell: The record will show very clearly what the various conditions along that line are. If the passage way is needed by the public, it should be opened, if it was already opened and not needed, it should be closed. I think there is authority for both, whichever the Commission may think is justified.

Mr. Horton: In order to make our position clear and I am sure it would be quite well understood by the Commission. The passage of the law under which we are proceeding contemplated just such conditions and provides the opening should be made and that is [fol. 46] the theory upon which we are proceeding.

Mr. Green: Of course, we can not agree to that. I just want to, without being tedious, say this much additional. We are just as much entitled to compensation for land taken for opening of streets and elements of damage as would be a farmer, and, before the 1919 law was passed, giving this Court exclusive jurisdiction over crossings, there was two or three opinions from our Supreme Court that there was no power to establish a crossing where there was none. This Commission was given by the 1919 law power to prescribe the place and necessity for a crossing, but, if there then exist no legal crossing they would have to condemn the crossing just like they would with any other property owner, unless we consent under the terms that may be made in the Commission's order.

Chairman Russell: I am sure the Commission understands the view point of both parties.

Mr. Green: We met with that same condition in the 1916 law which gives the Corporation Commission exclusive authority to order such crossing and does not provide——

Chairman Russell: We will get the facts necessary for the crossing and the demand for its use.

Mr. Horton: The statutes do not provide for condemnation proceedings.

Q. Then, in the third ward, there is no substantial number of people living south of Miami in the third ward?

A. No.

Q. So that these crossings enumerated in your testimony lying [fol. 47] south of the Union Depot cover all that part of the third ward that would be affected by this here in any way?

A. Yes.

Q. Now then, taking the other end, the north directions from the Union Depot, which is at the crossing of the Katy and Rock Island,

please state what crossings have been opened or exist north of the Union Depot?

A. 1173.6 feet north of Cherokee Avenue, which is the northerly crossing in the third ward, there is an over-head crossing at Grand Avenue.

Q. That is known as the Katy viaduct isn't it?

A. Yes. A distance north of that of 2129.8 feet there is a grade crossing at Monroe.

Q. What streets exist between Monroe and Grand?

A. You just want the number and not the names?

Q. Yes, you might give the names?

A. Washington, Adams, Jefferson and Madison.

Q. What is the next crossing open to travel north of Monroe?

A. The next crossing north of Monroe is a distance of 5983.7 feet to Stonewall Avenue,—over a mile.

Q. Mr. Fry, as City Manager, you are constantly going to and fro all over the city, are you not?

A. Yes.

Q. And you have constantly called to your attention the needs and wants of the people with reference to intercourse of travel?

A. Yes.

Q. And all those things which make up the existence of a people of a municipality?

A. Yes.

[fol. 48] Q. State whether or not, in your judgment, there is a necessity,—a public necessity for a crossing at Comanche Avenue as prayed for in this petition?

Mr. Green: I object to that as a conclusion and it would be in the province of the Commission to determine those questions.

Mr. Horton: I beg of the Court as he has stated his qualifications to answer the question and it is entitled to such weight as if it is in a jury trial.

Chairman Russell: The mere fact the city has filed this application is conclusive evidence that the representatives of the city feel that the crossing should be there, and as stated before, in the absence of direct testimony to the contrary, the Commission will take judicial knowledge of the fact that the people here do the usual amount of going to church and to fraternal societies and social functions, and, of course, to the movies and attending to business which necessitates convenient facilities for their travel to and fro over the city.

Mr. Horton: By the way Mr. Fry, where are the moving picture shows located in the city?

A. They are located in the business district or in the first ward.

Q. On Choctaw Avenue?

A. Yes.

Q. And the fraternal orders have their meetings in the first ward, do they not?

A. All that I know of.

[fols. 49-61] Mr. Horton: We offer in evidence to show by Mr. Fry, that in his judgment, after having qualified himself as competent to say that there does exist a public necessity for the opening of Comanche Avenue.

Mr. Green: We make the same objection.

Chairman Russell: The objection will be overruled.

Mr. Green: Give us an exception.

Chairman Russell: Note the exception.

A. It is my opinion the crossing should be made on Comanche Avenue.

Mr. Thompson: Mr. Fry, what arrangements has the city made, provided the city should put this crossing in, in reference to bearing a portion of the expense?

A. The city has no money set aside for it, they have made no definite arrangements. The city's fiscal year ends in June and it could be made out of next year's appropriation.

Q. It could be made then?

A. Yes.

Q. Presuming there will be a little additional ground necessary, either on the east or west, would the city be in position to acquire that?

A. I presume they would.

Q. As City Manager would you recommend it?

A. Yes, all those matters would be subject to the action of the city council.

[fol. 62] J. L. FARMER, called as witness on behalf of the City of McAlester, having first been duly sworn, testified as follows:

Direct examination.

By Mr. Horton:

Chairman Russell: I would suggest on undisputed points that we not duplicate.

Q. State your name?

A. J. L. Farmer.

[fol. 63] Q. You live in McAlester?

A. Yes.

Q. How long have you lived in McAlester?

A. Twenty-four years.

Q. What is your occupation Mr. Farmer?

A. I am in the retail mercantile business.

Q. Where is your place of business located?

A. South main street, 203.

Q. On which side of Delaware street is your place of business?

A. I am on the north side of Delaware.

Q. How far from Delaware?

A. About four hundred feet I guess.

Q. Where do you reside?

A. I reside on Ottawa and Oak streets in the third ward.

Q. How long have you been engaged in the retail mercantile business on what is known as south main street?

A. Seventeen or eighteen years.

Q. You are thoroughly conversant with the business conditions along that street are you not Mr. Farmer?

A. I think so.

Q. Also with the crossing conditions on the various streets which lie south of the union depot?

A. Yes sir.

Q. You have served in other times as a member of the city council of the city of McAlester?

A. Yes sir, for three years.

Q. As Alderman from the third ward?

A. Yes sir.

Q. You are well acquainted with residence and property conditions of the third ward?

[fol. 64] A. Pretty well.

Q. Mr. Farmer, I wish you would, in your own way, tell the Commission what, in your judgment, are the reasons that exist for or that require or demand the opening of Comanche Avenue?

A. Well, we feel that,—I do as a citizen of the town and of the third ward that, in order to develop property of the various wards we have to have access to the town and streets and facilities to develop property. The third ward is situated on the south side of town and bordered on the north by the Rock Island and on the east by the Missouri, Kansas & Texas Railroad Company. We have been almost shut out from the city on account of the lack of grade crossings over the M. K. & T. Railroad Company. The larger portion of the city lies on east of us and we are badly in need of grade crossings over there. Our ward is developing and we feel it would develop more if we had more street crossings to connect up with the main portions of the city. When I first located in the third ward we didn't have any crossings from the third ward over the M. K. & T., and we usually had to go around through the fourth ward, and, in 1906 or '07, I asked the council to pass a resolution authorizing the opening of Cherokee Avenue. We opened Cherokee Avenue and since we opened the Avenue the property developed very fast, a- there is scarcely a 50-foot lot on Cherokee Avenue that hasn't a house on it. We opened Ottawa Avenue and Ottawa is developing. Comanche Avenue is an ideal street and would develop if we had a crossing under the railway track to give connection with the city. It is very [fol. 65] inconvenient to get to the city on Comanche Avenue. We have an inadequate grade crossing at Delaware Avenue and it is down there in the section of the city where the canal cuts it off immediately after you go through the right-of-way. You go through the south side of the canal and then the canal,—the creek runs diagonally there and the creek cuts the street in two and the main

portion is on the drain. You have no connection whatever after you go through the dump, you have to go south through the marshy soil until you come to (?) or you have to go on south on Elm Street.

Q. Is Elm Street suitable for travel?

A. It is a street that lies parallel to the railroad track there and it is not a very desirable street. You have to come down through the marshy bottom there to get to the city and you could not do it in rainy weather, in fact it is not a very safe place to travel down the right-of-way, it is not practicable to travel it at night,at all.

Mr. Hopkins: Do you suggest we ought to——

A. No, it comes through the bottom there.

Mr. Horton: I believe you said the canal runs right down through it and just leaves a fraction of Delaware on each side?

A. The canal don't follow Delaware all the way, on the east side the canal takes a bigger portion of the street, and, as a result that street is not used very much.

Q. Mr. Farmer, take weather like this, is it practicable for two cars to pass at all at that under-ground crossing at all?

A. It is not safe, I don't know if they could cross under there. It is not safe for two cars, that canal is there and there is just barely [fol. 66] width for two cars to pass.

Q. In weather where cars are liable to skid, it would be dangerous to undertake it?

A. Yes sir. When they come east on Delaware there is only space of about 12-feet there between,— * * * I don't believe it is over nine or ten feet.

Q. In dry weather it requires careful driving?

A. Absolutely.

Q. Is it not true that Delaware is resorted to by people using it more as a sort of,—just an expedient and it never was designed or intended for a crossing or passage way through there in a legal manner?

A. It is just used largely by pedestrains, there is practically no automobile traffic on that street.

Q. Just a path taken by people as a short cut?

A. Yes sir. It leads into the business district. We are trying to get Comanche opened up so as to get to Main street.

Q. You were speaking of the wholesale houses located on that,— how many of them are located on South Main?

A. Well, there is a good many down there by South Main street, it is getting to be one of the main streets of the city.

Q. One of the leading furniture stores is on that street, is it not?

A. Yes sir, Mr. Chaney is located down there.

Q. I will ask you to what extent these retail stores on south Main are patronized by the people in the third ward?

[fol. 67] A. I think a large per cent of the third ward people patronize Main street stores, from the standpoint of convenience, they are nearer to them. I am sure a great many more will patronize them if we get the streets opened up where they can get across conveniently. It is inconvenient, they have to go back to "A" to

get to Cherokee and they have to go from "A" to Cherokee and come back down on Main street.

Q. So really the only two practical crossing- are on Cherokee and on Ottawa?

A. Yes sir, absolutely.

Q. The territory lying between those comprises most of the third ward?

A. Yes, and Ottawa is a very dangerous crossing, the railway company comes through and cuts it,—it is really dangerous.

Q. It was brought out by cross examination of Mr. Fry that in the block or blocks on Comanche Avenue lying immediately west of the M., K. & T. have not been built up by residences, I believe you stated just now that on Cherokee that was followed by having been built up?

A. Yes sir, there is businesses and residences over there. We have lumber yards, a gin, cotton yards and grocery stores immediately west since we have opened up over there.

Q. And a crossing at Comanche Avenue, what, in your judgment, would be the effect of relieving,—that is, what is there for that section of the third ward,—consists of some 1,500 feet there, that it would serve?

A. You mean what number of people that would serve there?

Q. Yes, what would be the effect on its growth and development [fol. 68] by opening up Comanche Avenue on that section of the third ward which is vacant?

A. It is a very beautiful residence property over there which lies high on the hill side and it would be developed very highly; there is a good many residences over there now on account of the beautiful property.

Q. This scarcity of crossings and the inconvenience has rather served to isolate the third ward?

A. Absolutely, yes sir.

Q. And has retarded its growth and development in keeping with other portions of the city?

A. Yes sir.

Q. What, in your judgment, would be the fact of the establishment of a crossing at Comanche?

A. The immediate development of a great many homes on Comanche and even on Seminole; people living on Seminole having to go south or through the fourth ward.

Q. This really keeps them from getting around equally as a social exchange?

A. It does, absolutely.

Q. Anything further, Mr. Farmer, that you think of?

A. Nothing that I know of only we are anxious to do some developing, we want to pave the streets.

Q. By the way, if you were to pave Elm Street so as to make it a suitable street for travel, the paving expense on the east side next to the right-of-way would fall on the railroad?

A. It is not practicable to have that because the railroad company could protest it out, which they naturally would, I think. I never knew it to fail.

[fol. 69] Mr. Horton: You may cross examine.

The Witness: It is really not a practical street to pave, I wouldn't ask the railroad company to pave a portion of the street, it wouldn't be justified, it wouldn't give any outlet if it was paved.

Mr. Horton: You may cross examine.

Cross-examination.

By Mr. Green:

Chairman Russell: How many grocery stores do you have in ward three?

A. Well, I know of one, two, three, four—I know of four small family groceries.

Chairman Russell: Where do they buy their supplies?

A. In the city here from the local jobbers, I am sure.

Mr. Green: Mr. Farmer, what is the nature of your mercantile business?

A. I am in the dry goods and furnishing and shoes.

Q. In what block on Main Street is this business?

A. I don't know—I am in the block immediately-——

Q. Can you tell from this map here?

A. Yes sir (witness consulting map), I am located in block 430.

Q. Abutting on Cherokee east of the tracks?

A. Yes sir.

Q. Where is your home?

A. I am located on the corner of Ottawa and Oak streets, in block 573, I believe.

Q. Do you own any property on Comanche west of the M. K. & T.?

[fol. 70] A. No sir, I do not.

Q. Do you own any other property in the third ward but your home?

A. Yes sir, I own some property there.

Q. Where is it located?

A. I own some on Delaware. I did own quite a bit but I sold it, the reason I (interrupted).

Q. I think that is all.

A. (Witness continuing:) —got rather discouraged. It is just the interest I have in the ward, I have no special property interests involved.

Mr. Green: I think that is all.

Mr. FRANK CRAIG, called as a witness on behalf of the City of McAlester, having first been duly sworn, testified as follows:

Direct examination.

By Mr. Horton:

Q. Your name is F. M. Craig, commonly known as Frank Craig?
A. Yes sir, Frank Craig.
Q. What is your business?
A. President of the City National Bank.
Q. Are you connected with any other business?
A. Yes, I am Treasurer of the Building and Loan Association here.
Q. Where do you reside?
A. McAlester, at the corner of Second and Commanche.
Q. You live on Comanche Avenue then?
A. Yes.
Q. How far from the Railroad?
[fol. 71] A. About a block.
Q. What is the street you live on, Second and Comanche, is this street the street that is most generally used to get up town?
A. Yes, it is the principal street coming up town.
Q. Now then if Comanche Avenue should be opened and become a street, then you would really be right on the corner where Comanche would turn out and come up town?
A. Yes.
Q. How long have you lived in McAlester?
A. Twenty-six years.
Q. You practiced law at first, I believe?
A. Yes.
Q. How long have you been in the banking business in McAlester?
A. Twenty-one years.
Q. Mr. Craig, in your bank, like other banks, you lend money?
A. Yes sir.
Q. And you are connected with the Building and Loan Association?
A. Yes sir.
Q. Mr. Craig have you made a study, or, have you had in mind the existence of conditions in the third ward as to property and social conditions being affected by the present railway crossings along the M. K. & T. south of the Union Depot?
A. Yes sir.
Q. I wish you would please state to the Commission, in your own way, the facts about that?
A. Well, from our standpoint of the experiences in the Building and Loan Association, we have always looked upon third ward property as very undesirable because of its inaccessibility, and, while we make loans in the third ward, we don't make them on anything [fol. 72] like the same basis of value as we do in other portions of the city. We always take the cost of a house into consideration and

because we have always figured that being so hard to reach and so inaccessible that the sale value was so very materially affected, that on a house costing the same money in the second ward, for instance, we will lend about twice as much on a house in the second ward as we will in the third ward. And, I know from personal experience, if this is responsive to your question, I have a friend over there that used to live across the street from me, W. H. Julian, Agent of the Rock Island Railway, who now lives in the third ward. If I want to go to his house, I go to Cherokee north and then come back that two blocks south in order to reach him.

Q. You pass over Delaware then?

A. I don't try Delaware at all, it is right there at the railroad cut, it is a bad street to get across and it is hard to see a train and very dangerous place to cross the railroad track. I don't believe I cross Delaware once a year.

Q. You mean Ottawa?

A. I don't believe I cross Ottawa once a year and I don't believe I have crossed Delaware since the viaduct has been opened at Cherokee.

Q. You go clear up to Cherokee north to get to Mr. Julian's house?

A. Yes.

Q. Why don't you use Delaware?

A. Well, it is narrow and bad. When I go over there it is most [fol. 73] always at night. It is a good place for a hold-up and I don't want to take the chances.

Q. Isn't there a grade switch along there you have to cross?

A. Yes, there is a grade switch.

Q. Mr. Craig returning to this subject of loan values, you have already shown what a disadvantage, comparatively, to property in the third ward as contrasted with property, we will say, in the second ward, what, effect, if any, does that condition have on the development and growth and building up of the third ward?

A. Well, it retards it very much because the people who are living in the third ward are not as a class of people of very much means, the majority of people who have lived in the third ward have had to borrow part of the money—and because of those conditions it has made it harder for them to borrow money from the Building & Loan Association or from the other companies who lend money here to do their building with.

Q. Forced the people to have cheaper homes and living accommodations?

A. It has forced them to build in other parts of the city where they could get loans.

Q. And resulted in a sparcer population of the third ward and less highly improved conditions?

A. It has.

Q. Speaking of Elm Street, Mr. Craig, as a mode of highway for travel, what do you think about that?

A. Just Elm Street.

Q. That is that little street that runs along there north and south?

[fol. 74] A. West of the Railway.

Q. Yes, skirts up to the right-of-way there?

A. Well, it would be impracticable under any present or prospective conditions to make a street there because of the character of the ground. It would be very expensive to build a street on there, the property is undeveloped along it on the west side of the street so that if the city were to attempt to pave it it would be impossible to sell the improvement bonds to anyone because property values there wouldn't support them.

Q. So that these conditions there are due to the lack of crossing facilities which have really put that part of the third ward back——

A. Yes sir, it has.

Cross-examination.

By Mr. Green:

Q. Mr. Craig, where is your home?

A. My home is on the north half of Lot 10, in block 479.

Q. In other words the corner south of the street is Comanche Avenue and east of the M. K & T. tracks?

A. Yes.

Q. Do you own any property in the third ward?

A. Yes.

Q. How much and where is it located?

A. I can't tell you just where it is located. I have two lots.

Q. Just give the blocks?

A. I couldn't give that.

Q. Are they on Comanche Avenue?

A. No, they are not on Comanche Avenue.

[fol. 75] Q. Do you know what street they are on?

A. I can't be sure but I believe they are on Seminole.

Cross-examination.

By Mr. Hopkins:

Q. They are south of Comanche Avenue?

A. I am not sure. I believe it is block 5 and part of lot four in block 485, now that is my belief I couldn't be positive.

Q. Then your personal interest in this matter is largely about your loan business and your banking business would be helped by the development of the third ward?

A. No, I don't know that it would help out business at all because we have more applications for loans than we can take care of, consequently we are not giving them to the third ward but if that street was opened we would give the third ward much more consideration.

Mr. Hopkins: That is all.

Redirect examination.

By Mr. Horton:

Q. Nearly all the structures outside of the school building and possibly Captain McKimmins' old home, which I believe is of rock built,—nearly everything is frame?

A. I think everything down in that part immediately south of the Rock Island Railway track is, there are some brick houses.

Q. I will ask you what accessibility the Fire Department has in case of fires in that ward there to speak of on a loan basis?

[fol. 76] A. Well, now I am not an expert on fire matters. It seems to me it would seriously affect it.

Chairman Russell: The Commission thinks he has already hit the third ward hard enough.

Mr. Horton: That is all.

Mr. Hopkins: Mr. Craig, you have said, I believe, that it was necessary at Delaware to cross a switch at the grade?

A. Yes.

Q. Do you know whether it would be possible without prohibitive expense to construct an under-pass at Comanche without at the same time having the necessity of crossing an industry track at that grade?

A. I presume you would still have to cross that track at Comanche, but the difference would be that would be——

Q. There is very little movement over that track, isn't there?

A. Very little, it is my understanding.

Mr. Hopkins: That is all.

Mr. Green: Do you know where the fire plugs are located in the third ward?

A. No.

Q. Are there any on Comanche Avenue?

A. I don't know.

Chairman Russell: We will recess until 1:30 and get back sooner if possible.

(Whereupon hearing was recessed until 1:30 p. m.)

[fols. 77-101] (Hearing resumed at 1:30 p. m., before Chairman Russell.)

Chairman Russell: If you are all ready we will proceed with the hearing.

[fol. 102] Miss Rose D. Ewens, called as a witness on behalf of the Respondent, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Green:

Q. You were sworn this morning in this case, weren't you?
A. Yes.
Q. You are the City Clerk?
A. Yes sir.
Q. I hand you here a record book and ask you what that is?
A. Ordinance Record No. One.
Q. Of McAlester?
A. Yes.
Q. I will ask you if that contains Ordinance No. 74?
A. It does.
Q. What date does that show that Ordinance to have been passed and approved?
A. It was approved on the 8th day of November, 1901.

[fol. 103] Mr. Green: We offer in evidence the Ordinance and ask leave to substitute a certified copy for the record.

Mr. Horton: We desire to ask the purpose for which it is sought.

Mr. Green: As proving a contract between the M., K. & T. and the Plaintiff in this case, covering among other things the Comanche Avenue crossing if it should be ever opened.

Mr. Horton: The City of McAlester objects on the ground it is incompetent, immaterial and irrelevant and for the further grounds that it is attempted to introduce it as a contract. It is beyond the power of the City Council to *have* bind the city in any such way. All those things are subject to a general law and that if it had been valid at that time, which we deny, it has been superseaded by subsequent legislation which gives to the Corporation Commission power to apportion the expense between the parties and to assess such part as the city ought to pay, if, in the judgment of the Commission it should pay anything; and, for the further reason, one of the conditions of the Ordinance, which is sought to be introduced here as a contract, that the railroad should provide an under-grade crossing at Delaware and the evidence shows here it has utterly failed to do it, and it would have been part of the consideration of the alleged contract and necessary to support it and they haven't kept that part themselves and for all those reasons, the city objects to the introduction of [fol. 104] this Ordinance No. 74; for, as I understand it is introduced for the purpose of showing the contract between the city of South McAlester, I. T., and the M., K. & T. Railway Company, whereby it was stipulated in Section 9 that if Comanche Avenue should ever be opened all the expense of it should be borne by the City of McAlester. I think that contract is ultraviolate and contrary to public policy.

Chairman Russell: The Commission recognizes that it is very doubtful as to the validity of this document but it would take less time to put it in the record than to,—It will be considered on the

basis for such value as it may have. If we were drawing strict technicalities we would,—The Commission will endeavor to keep itself free from bias and prejudice and consider each of these things when we come to them. The objection will be overruled.

Mr. Horton: I understand that is your general custom in all these hearings and that there is no exception being made in this case; at the same time I want to vigorously protest against it. I don't think the City Council could have provided such a thing, and, if so it was superseded by the act of 1919 which provides the cost should be apportioned by the Corporation Commission and makes the Corporation Commission the exclusive arbitrator and Judge and provides that an amount greater than one half shall not be assessed against the City.

Chairman Russell: All those facts will be considered.

Mr. Green: Your objection don't go to having a certified copy of it [fol. 105] introduced, does it?

Mr. Horton: Not at all.

Mr. Green: Then we ask the certified copy by identified as Exhibit One. Inasmuch as Judge Horton raises some very grave legal questions, I am going to ask now, I be permitted to file a brief on this.

Chairman Russell: You will be given permission to do that.

(Mr. Green reads part of the Contract above referred to, which is not reported at the request of council.)

Mr. Horton: I want to add to our objection this Ordinance offered as a purported contract is inadmissable for the further reason that it is without consideration,—without inadequate consideration.

Mr. Green: Miss Ewens, I hand you here another book and ask you to state what that is?

A. Council proceedings No. 2 of the City of McAlester.

Q. Will you please turn to the records of April 5, 1909, and see if you find recorded there Resolution No. One of that day?

A. (No response.)

Mr. Green: The Defendant will now offer three or four Resolutions passed in April, 1909, by the City authorities of McAlester, for the purpose of showing that they, at that time adhered to and continued to carry out the terms and provisions of Ordinance 74.

(Witness explains some records which are not reported at request of Counsel.)

Mr. Green: I just want to say for the record that these resolutions [fol. 106] cover the action of the City of McAlester in April, 1909, offsetting a judgment they had promulgated against the M., K. & T. for taxes against certain parts of the cost of certain crossings built over the M., K. & T. premises under and in accordance with Ordinance No. 74. You find Resolution No. 2, do you?

A. It don't seem to be numbered.

Q. You find a Resolution referring to a judgment against the M., K. & T. on April 5, 1909?

A. (No response.)

Chairman Russell: This may be interesting as ancient history and we will overrule the objection and note an exception.

Mr. Green: Do you also find as of April 12, 1909, Resolution No. Two? You do find that?

A. Yes.

Q. Do you have also resolutions Nos. 3 and 4 as of April 13th?

A. Yes.

Mr. Green: The Defendant now offers all of these Resolutions in evidence according to the statement I have just made and for the purposes I have stated. In other words, we now contend they have no right to make the contract. I want to show ever since statehood they continued to ratify and live up to it, and, if through some technicality it might be illegal as a strict legal proposition,—it was not properly passed or was overreaching, it would certainly come from bad grace after reaping the benefits of it and trying to get out of it now.

[fol. 107] Mr. Horton: To the offer of each part of the Resolutions the City of McAlester objects for the reason are all the reasons given in the objection to the admission of Ordinance No. 74, and asks that these reasons be considered as applicable to each one of the offers; and, for the further and additinal reason that the original contract being void in so far as it affects Comanche Avenue and that it could not be ratified and made binding; and, for the further reason that the offers now made in nowise pertain to Comanche Avenue. You understand Ordinance No. 74 was introduced for the purpose of showing the entire cost of opening Comanche Avenue should be assessed against the city for the reasons already stated. We say, that is the thing that could not be done. The offers now made are wholly immaterial, irrelevant and incompetent.

Chairman Russell: The objection will be overruled and exceptions noted and the Resolutions will be admitted for such consideration as the facts warrant when they come on for consideration.

Mr. Green: We ask permission to substitute certified copies to the record.

Mr. Horton: There will be no objection to that.

Mr. Green: Also a certified order of the judgment to which they refer. This is all for this lady if you are through with her.

(No response.)

Witness excused.

[fol. 108] Z. G. Hopkins, called as a witness on behalf of the M., K. & T. Railway Company, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Green:

Q. Please state your name and residence and official position with the defendant railway?

A. Z. G. Hopkins, residence, St. Louis, Missouri; I am Assistant Chief Operating Officer of the Missouri, Kansas and Texas Railway.

Q. Mr. Hopkins, I wish you would just go ahead and state in your own way the attitude of the defendant toward the opening of Comanche Avenue, if it is done in accordance with contract ordinance No. 74?

Mr. Horton: We object to that question. It is hypothetical and put in accordance with something else.

Mr. Green: We just want to show what the attitude would be if it was adhered to.

Chairman Russell: What was that question now?

Mr. Green: Mr. Hopkins, I wish you would just go ahead and state in your own way the attitude of the defendant toward the opening of Comanche Avenue, if it is done in accordance with contract ordinance No. 74? In other words, whether we are still willing to carry out our part of the contract and let it be opened without any objection on our part so long as the city lives up to the contract?

Chairman Russell: That is all right for him to tell what their attitude is.

[fol. 109] Mr. Green: He speaks officially.

Mr. Horton: We object to the testimony called for by the question.

Chairman Russell: The objection will be overruled and exceptions noted.

A. So far as the opening of an under-grade crossing at Comanche Avenue is concerned, we would object to it if it is opened in conformity with Ordinance 74, which we consider is a contract made by the Railroad and the City carried out in good faith on our part. I would like to state, however, that the opening of an under-grade crossing at Comanche Avenue without the lowering of our tracks as we go south, an induction of the grades would necessitate raising the track at Comanche Avenue, and the points between there and Delaware, which, until such time as our grade was reduced would be some disadvantage to us for the reason that we have a very difficult grade situation right at this point any how. The grade south bound as we approach the Rock Island crossing is against the movement of trains. After you pass the crossing you start then on another grade as you approach a point down about Osage Avenue—Osage is approximately at the top of the hill, that, if the Commission please, is the next street beyond Ottawa?

Mr. Horton: You mean South Ottawa?

A. Yes sir; however, while it would be some slight disadvantage to us, until such time as that grade is reduced, we would not object to the construction of an under-grade crossing at Comanche Avenue on that account, if it were put in under the terms of the contract [fol. 110] covered in Ordinance 74.

Chairman Russell: The raising of that would in the end be an advantage.

A. The raising of the track, unless the gradation south were re-

duced would not be an advantage. It would be no disadvantage if the grade is reduced at the point farthest south. I might state in that connection our own plans, independent of the Comanche Avenue crossing question, contemplates a reduction of that grade some time, we hope in the near future, depending a lot on our financial situation.

Q. Just state anything else you desire to state.

A. From an engineering standpoint, I might say, we have had our Engineer make some preliminary investigations as to the feasibility of an under-grade crossing at Comanche Avenue, except for the things to which I have already referred, it is feasible from an engineering standpoint in the opinion of our Chief Engineer, who at my suggestion has made a preliminary investigation. A reinforced concrete girder of probably 24-feet clean span would be the structure required to carry our tracks over the roadway. It would be necessary also in order to get the over-head clearance necessary in the subway to lower certain industry tracks east of our main line tracks leading up to various wholesale concerns north of Delaware Avenue fronting on Main Street.

A voice: How many tracks please?

A. At Comanche Avenue I think there is two,—no there is one at Comanche Avenue. Our preliminary investigation indicates that [fol. 111] it would probably be necessary to lower the grade of the industrial side tracks between two and three feet in order to get the required over-head clearance, and, of course, it would also be necessary to raise the main line tracks to some extent. The main track would have to be raised slightly more than a foot at Comanche Avenue. The estimates of the expense of such a structure as I have outlined and the necessary changes in the main line and the industrial side track levels indicate the cost of the structure complete, ready for use, would be in excess of $28,000.00.

Q. Is there any matter of additional tracks to be provided for on the road bed proper?

A. It would be necessary, of course, in providing a structure in such a way as to accommodate additional tracks if the necessity for them developed. We have plans for a double track development if the traffic increases which perhaps would require one or more additional tracks on that fill.

Q. What would be the attitude of the railroad towards the crossing of Ottawa if it should be found feasible and proper in the event Comanche Avenue is opened as an underhead crossing?

Mr. Horton: I don't think that issue is called for in this.

Chairman Russell: Let him give his views?

A. I think that would obviate any objection from a railway operating standpoint. The opening of an under-grade crossing would be of absolutely no benefit to us unless it carried with it the elimination of some grade crossings and the reduction of hazards at grade crossings.

[fol. 112] Chairman Russell: It would be of some advantage to the extent of what portion of the people who voluntarily travel it.

A. I speak from an operating standpoint and with this thought in mind some of the benefits in the number of trains from the elimination of grade crossings are considered, but, so long as you have a grade crossing, you never can tell when you are going to find someone on it, and, of course, so long as there is a grade crossing there, although *there* may not be frequently used, it requires some attention to control speed and all those things.

Q. Do you care to introduce in evidence this blue print in connection with your testimony?

A. I think that is desirable. It will enable the Commission to determine the track situation.

Q. This does show the M., K. & T. track situation, does it?

A. Yes sir.

Q. I will first ask the Reporter to mark the Resolutions offered as being identified as Defendant's Exhibits 2, 3, 4, and 5, and a certified copy of the judgment referred to as Defendant's Exhibit 6, and then this map as Defendant's Exhibit 7.

A. I would like to add, if the Commission please, in connection with the grade reduction plans to which I have referred which will involve de-pening the cut at and near Osage Avenue, we feel when this work is carried out that it would be advisable to put in an over-head crossing at Osage, and that, we have had in mind suggesting to the city at that time, that the crossing at Ottawa Avenue, that [fol. 113] grade should be closed.

Chairman Russell: How far is Osage south of Ottawa?

A. One block; that, with this grade reduction will lend itself naturally to an over-head structure because the lines will pass through a cut there and it will not be necessary to make heavy fills to get an approach to an over-head structure, or, will it be necessary to make any excavation to get sufficient over-head clearance.

Q. What was that over-head clearance that you named?

A. I might say, for the information of the Commission, that the type of structure that our engineering department has considered as advisable at Comanche Avenue is the same type of structure as was put in at Alice Avenue in Oklahoma City. The Commission made an order in connection with that grade and the plan was approved by the Commission, that was a situation very similar to this. I said that in order if you want to consider the plan in any way. We have prepared no definite plan for this structure. You can get a line on what we consider would be necessary to carry the tracks there. There has been more or less said about the crossing at Delaware. There are two 24-foot spans over Delaware Avenue. Now, it is possible that at small expense, relatively small expense as compared to a grade separation at Comanche Avenue, as far as the railroad is concerned, to get a very satisfactory crossing at Delaware, it is not paved at this time but it could be paved; railings could be provided that would obviate any of the differences which have been brought

out. The size of the span is shown on the map we have filed as an exhibit.

[fol. 114] Mr. Green: That is all for us.

Cross-examination.

By Mr. Horton:

Q. Now when you speak of a 24-foot span, does that include the inside measurement?

A. Yes sir.

Q. You mean there is a clear space of 24 feet between the base of that column there in the center that comes down there between those two spans?

A. They are separate units.

Q. What is the width from outside to outside of the whole span?

A. Well, I have 24 feet inside.

Q. Clear between the base——

A. It would depend on how much excavating you do out at the side. If it is desired we can furnish the exact dimensions of that.

Q. From Delaware crossing up to south Main, don't you remember there is just a narrow strip along there, it is mostly occupied by the branch, the canal runs right through the center of the street and there is a good part on the north side of the branch and then the remnant left on the south side. I don't believe the Commissioner can hear very well unless the Gentleman talks a little louder,—on the south side there that would make a very narrow street, that would constitute the street for use, wouldn't it?

A. As the matter now stands so far as your ingress and egress of [fol. 115] railroad property is concerned we could give you additional space to the south there.

Q. The property line, I think comes right in here (Indicating), I am speaking of the north boundary line, Lot One, Block 480, between that north boundary line and the edge of that storm sewer there. Do you know how wide that is. This is the point I am indicating at, at the northeast corner of Lot One, Block 480?

A. This map is drawn to a scale, the Commission can reach a conclusion on that.

Q. As a matter of fact it is narrower there at that point than it is down on the railroad right-of-way,—much narrower?

A. The map indicates it is, yes sir.

Q. The map indicates it is not over half as wide?

A. It would hardly indicate that.

Chairman Russell: The greatest objection to Delaware Avenue is that that and Cherokee are close together and that there is not much use for it there.

A. The only point in my mind in connection with that is this: There has been more or less reference to the fact that there is no crossing between Delaware and Ottawa and that that is a distance

of 1,500 feet, approximately, I think, as Mr. Fry testified, it is our position and intention that a distance of 1,500 feet between crossings where grade separations have been made in cities, it is not an excessive distance. The practice generally adhered to in communities much larger than this is putting grade separations at intervals of from three to four blocks.

[fol. 116] Chairman Russell: But, having in mind the overhead, which, in time would be desirable down at Osage that would further lengthen the distance, that being the case, it would be much more convenient to divide the distance from Cherokee to Osage with the under-grade at Comanche than it would be to have Delaware and Cherokee right together.

A. There is no question as to that, of course, our position simply is the distance which would be computed from Delaware, because there is a situation there that can be taken care of and develop a very satisfactory crossing.

Chairman Russell: No question but what that could be done, but the Commission does not feel the city would be justified at this time with the amount of traffic that is available to go to the extra expense of fixing up Delaware, when we assume both drives can practically be accommodated on Comanche Avenue. These under-grade crossings are really too expensive where you have to bridge an open sewer?

A. Neither the community nor the railroad can stand it.

Mr. Horton: Even if you bridge that open sewer, when you got down to that archway there at its narrowest point down there, it would still be too narrow.

Chairman Russell: Well you are going to come one way on one side and the other on the other.

A. If it fronts on that siding you could go on either side.

[fol. 117] Chairman Russell: Right at this point I might give the Commission's views with reference to matters of this kind. When the question comes up of discussing the apportionment of costs between the railroad and the city or between the carriers and the public, the Commission does not view it in that way, we look beyond the carrier. The carrier is only a means and a facility through which the costs in the end is collected from the public. The transportation Company has no funds, it has its original capital but for operating capital it has no funds but what it collects from the public; and the question comes before the Commission for consideration is: what portion of this cost should be borne by the people locally and what portion should be borne by the general public over the entire system and that portion should be, we say, we assess against the carrier, knowing as we do the carrier must in the end collect it from the patrons, the local people also paying a portion of that which is applied to the carrier, also the people over the entire line paying that portion of it to be assessed to the carrier as the advantages which accrue to them by reason of the better operating facilities and also

by the less damages,—when we have a crossing there and some fellow attempts to beat the Katy Flier to the crossing and he doesn't succeed, the particular community where he lives has its widow and orphans on its hands and such damages as may be assessed to the carrier has to be borne by the carrier, not by the carrier direct, but by the public as a whole *on* the patrons of that railroad have to pay it, either through passenger fares or freight charges to furnish the money to pay the damages that are assessed; so, in that connection, [fol. 118] when a safe crossing has been provided. The Commission can not agree with one or two of the witnesses here who have said that people of good judgment will go to the under-ground crossing where it is safe, but we believe the dangerous crossing should be left open so that those who desire to do so can use it,—is it not made from the view point that the fellow is just taking his own chances and if he gets killed the railroad company pays for it, and, so it is a matter which should be seriously considered. And when the public has taken steps through the regular channels of government and supervision to provide a safe crossing, then it is the right of the public to say to the reckless fellow, "if you don't want to use the safe crossing, that you must use the safe crossing, that we can not afford to take chances on you getting yourself killed and leaving your widow and orphans on the community and also having a big damage bill which ostensibly is assessed against the carrier, which, we as patrons must pay in the end, that comes very forcibly before the Commission for the reason it is our business all of the time to watch at every point to get lower rates for the public, and all the damages that are paid and all the court costs and all those things that pile up in the operating costs and stare us in the face when we go to consider what rate the public must pay to maintain the business; and, if the facts as developed so far in this hearing, that the country people who live southwest can reach the city on just as short a road and just as convenient by driving a little further north than going through an under-pass instead of going through the dangerous crossing when there is no very great advantage to [fol. 119] *to* be had then that should be eliminated, and, it appears to the Commission from the facts so far developed that there should be an under-grade crossing at Comanche and if that is completed so that the public can use it,—then we should apportion out ourselves the distance apart so that the travel can be accommodated and let the man with good judgment go to them voluntarily and let the fellow with bad judgment be forced to go to them for the protection of his neighbors.

Mr. Horton: If your Honor please, I am very much struck with what the views of the Commission are as a whole and it is a general application, which, in this particular instance the city complains there are insufficient number of crossings to give the third ward sufficient accommodation. It would not be our idea that the grade crossing at Ottawa should be abolished, as a matter of fact, I think there have been no accidents at that crossing since it was opened.

Chairman Russell: If there hasn't been it would be a very happy thing to dispose of it before they do have one.

Mr. Hopkins: They have had.

Mr. Horton: Of course, if they should put an over-head crossing at Osage we would have no objection, but we don't think that our application to have the under-ground crossing at Comanche should be conditioned upon the abolition of the grade crossing at Ottawa.

Chairman Russell: That is not a part of the case that is before us now, but I took occasion there to express what the Commission's [fol. 120] views were and the end to which we were striving toward.

Mr. Horton: Yes, yes, the number of crossings if Comanche is opened will still practically only be two south of the junction, that is if you cut out Ottawa, you would still only have two.

Chairman Russell: The Commission must recognize no good paved crossing there would handle all the traffic that comes before there, and, a little later on there must come before the Commission the question of apportioning the costs of this work and as I laid down the rules in which we must in fairness be governed by and if this expense were to be incurred and you had no grade crossing by eliminating the operation conditions, therefore, the benefit which ac-rues to the patrons of the road as a whole, the only saving the carrier gets is that portion of the public which voluntarily uses the under-ground crossing is protected and reduces the possibility of a damage claim.

Mr. Horton: We think this is a matter to be dealt with as it might arise. We would be in a very serious condition if we would have Ottawa closed unless Osage was opened. We wouldn't like that. We realize the element of risk and danger which remains while Ottawa grade crossing is obtained is something to be considered and if that is removed by closing that it should be included, of course, taking into consideration the apportionment of the expense on Comanche, because if they were getting any resultant benefit from the closing of the other and apportioning the matter of expense, but we——(interrupted).

Chairman Russell: Also, these are matters which should be looked [fol. 121] into in general, for this reason, if we wait until a city settles up and people have property butting right up against the right-of-way, as at Tulsa, where they are thick all along the line and they will insist they have some under-ground crossings—which makes an impossible situation and then we are up against this: The people who have that property abutting on the street, and the question of closing it, then they are up for damages and, so it is well to face these things on ahead and work toward a definite end and, after a conference over the matter and it was planned out the proper thing to do was to open up Comanche and after that was done and provided for open Osage and then close Kiowa, then somebody wouldn't be building up some property——(interrupted).

Mr. Horton: You mean Ottawa instead of Kiowa?

Chairman Russell: Yes. The man who has the little house and later on if he should build a two or three story brick, then the question comes up—that is why it is well to work these things out ahead and for that reason I was going beyond the scope of this case to outline

to you what the Commission's policy is in matters of this kind and the results we hope to obtain as rapidly as practicable. Is there anything further?

Mr. Hopkins: We have had the principle you have just announced in our development plans for our grade reductions, and, we felt in view of our agreement with the city, the burden of opening Comanche was on the city, but, in view of the fact there is now an existing grade crossing at Ottawa which is not satisfactory, either to us or the [fol. 122] city, with the development of our plans there that should be eliminated by the provision of an over-head, but, as I said, if an under-grade crossing is provided at Comanche without closing the grade crossing at Ottawa from an operating standpoint, there is little or no compensating benefit to the railroad.

Chairman Russell: The Commission realizes all the things now being discussed are not going to be accomplished this summer. If that is the proper solution in the end, it should be planned along that line. If the public is—then they will in so locating and so developing the abutting property as to put themselves in a position to be entitled to compensatory damages later.

Mr. Horton: I want to say, if the Commission please, right at this point, we hope that the Commission if it makes an order for the opening of Comanche Avenue, it will not take into consideration at all the question of closing Ottawa. We are dissatisfied with the grade conditions and the closing of Osage so far,—The Rock Island has at every street a grade crossing open and the Katy has one up there at Monroe, one at Cherokee and over here at Ottawa and those are all they have outside of the one at Grand Avenue, because Delaware is not a crossing, they put it down there to take care of that branch, it is not practically used, just casually like we use a railroad and here for a distance of three or four miles the Rock Island has these crossings all along. Your Honor, I protest seriously on behalf of the City against this idea of closing Ottawa to be taken into consideration in connection with this hearing. If Ottawa should [fol. 123] be closed, I don't think it should be.—The Commission in considering this matter, the contemplation of closing this up at Ottawa, we think we ought to have another crossing for the people to get back and forth. There is a great part of the second ward,—a tremendous population over there. The people in that part of the second ward and the people in the third ward ought to be permitted to pass back and forth to see each other through Ottawa, and, even with that they would have only a very limited number of crossings which the Rock Island gives us and I don't believe there has been many damages against them for all their crossings, none of any serious consequences. Inasmuch as we have been favored with the views of the Commission I thought it well,—if that should be deemed advisable, then, of course, that will be a matter for consideration at that time, but we think we ought to have enough crossings in the large line of territory that is covered by the Katy from the time it enters the city on the north and leaves on the

south and we ought to have as many as they would still have by still keeping Ottawa open.

Chairman Russell: The Commission will refrain from further comment.

Further examination of Mr. Hopkins.

By Mr. Horton:

Q. Mr. Hopkins, you say some tentative estimate by your engineering department indicated the cost of this crossing down there of something in excess of $28,000.00?

A. Yes sir.

[fol. 124] Q. That was exclusive, I take it of the other changes that would be necessary, the raising of the grade and the lowering of the service track along there?

A. Yes sir, all things necessary to be done to provide the crossing.

Q. What portion of that sum covers the cost of raising the grade?

A. I am unable,—The preliminary estimate was made by our Engineering office in St. Louis and Mr. Thomson our District Engineer is more familiar with that estimate and he can give you that information. Knowing the cost of similar bridges at other points, approximately $18,000.00 would cover the cost of the structure to carry the track. The other portion would be the raising of the grade and the lowering of the industry tracks and the paving. I know approximately the cost of the Alice Avenue crossing in Oklahoma City, that wouldn't give us much to go by in this case. The construction of the cut-off, it wasn't necessary to excavate to get under,—I know the cost of the concrete structure and the cost of the — (?) crossing and others and I believe the approximate cost of $18,000.00 would cover the cost of the concrete and the excavation and the structure. The amounts in addition to that would be the expense of raising the main line tracks and the paving.

Q. You know at Cherokee the top of the dump there is a good deal wider than it is down at Comanche, isn't it Mr. Hopkins?

A. I think it is, yes.

[fol. 125] Q. Now all they had to do was some track raising and when they put in the under grade crossing at Cherokee that only cost about $7,000.00?

A. I can say on that score that was done a good while ago.

A. But a great deal more work?

A. When we attempt to duplicate our jobs for what they used to cost they are more than doubled——

Q. I wouldn't think they would run four times as much?

A. We have had some that run more than three times as much.

Q. Your estimate included a diagonal crossing as indicated there?

A. We have made no detailed plan for that crossing. We have come to the conclusion that a 24-foot girder type would be required and that would afford adequate passage way as to the alignment of the roadway. We have made no detailed plans for our improvements, though, after looking over the ground I think that a right

angle crossing would not be the desirable crossing there, it would probably be necessary to get some additional property there in order to get the proper alignment.

Q. Mr. Hopkins, the road is figuring on making that elevation of its trackage there any way, isn't it?

A. Oh, yes, we are there and many other places but we have made extensive plans for grade revisions all over the railway but they are all conditioned to the development of the traffic to a point where the saving would result in returning the additional investment required.

Q. Would you say you must raise the tracks there in order to have an under-ground crossing there instead of an over-head?

A. (No Response.)

[fol. 126] Chairman Russell: Anything further?

Mr. Horton: I will ask you, Mr. Hopkins, whether or not you know it to be a fact, an engineering fact, that the track at Comanche will have to be raised in order to have an under-ground crossing?

A. The result of the investigation of our Chief Engineer he says that that will be necessary; from my observation of the ground, it seems to me that it would be necessary.

Chairman Russell: It being within the plans of the company to raise that any way, they would do it.

Mr. Horton: We are absolutely convinced we have plenty of room there to go under it, even if we had to scoop a little there to go under it, we could supply storm sewers to take care of the water. It is not an essential thing to raise the track, we do not think it is a fact it is absolutely necessary to raise the grade in order to provide us with this under grade crossing.

Mr. Hopkins: I will say as to that, if the Commission please, it is speculation as to whether it is or is not necessary to raise the tracks. There is an established over-head clearance for over-head crossings and I think the Commission is informed as to what the clearance is. The question as to whether the raising of the tracks is a matter of speculation.

Chairman Russell: The Commission has no views on that at all. We will rely on our Engineer on that point, as to what is and was necessary, he has all the facts and will go into it very carefully.

Mr. Horton: What is the number of feet necessary there? Generally what is the requirement of the Federal Highway Department?

[fol. 127] Mr. Thomson: Fifteen feet in cities and in some places they will consent by special permission from Washington to 12½ feet.

Mr. Hopkins: Anything under 14 feet is highly undesirable. Sometimes there are some pretty high roads.

Chairman Russell: They are figuring on some farmer might bring some hay in there?

Mr. Hopkins: We hope he will and ship it.

Mr. Horton: We have plenty of room down there.

Chairman Russell: I am sure you wouldn't want an opening there that would prevent moving vans carrying people into the third ward.

Mr. Horton: We had thought seriously that there was sufficient room there for sufficient over-head for the crossing.

Chairman Russell: It appears to me there is from the climb I made there this morning. Those are facts the Engineers figures will show.

Mr. Hopkins: As Senator Russell said, that is a matter for the Engineers, we could speculate on it but we wouldn't get any where. If the Commission desires we will be very glad to furnish the height of the dump there from our records. I wouldn't want to submit it off-hand. We have nothing further I think, Senator. On any plan for a bridge to carry our tracks we would, of course, have to insist the structure carry the tracks would conform to the established standards.

[fol. 128] Chairman Russell: The Commission wouldn't consent to anything else.

Mr. Hopkins: I was just suggesting that in connection with any plans the city may present, they should prepare them with that in view to carry the track road.

Chairman Russell: How long will you want to file your brief?

Mr. Green: Thirty days.

(Further argument by counsel which is not reported.)

Chairman Russell: The case will be closed. We will give you fifteen days to file your brief and you may answer whatever you want to.

(Case closed.)

[fol. 129] DEF'TS' EX.

M., K. & T. Resolution No. 1

Resolved, That the City Clerk be directed to draw warrant in favor of the Missouri, Kansas & Texas Railway Company for Ten and 85/100 ($10.85) Dollars, to cover court costs payable by the City in the case of Missouri, Kansas & Texas Railway Company vs. City of McAlester and Ira N. Eubanks as Tax Assessor and Collector of the City of McAlester, said case bearing Court Number 2769 on the docket of the United States Court for the Indian Territory at McAlester, the judgment for said costs having been rendered in favor of said Railway Company and against the defendants on December 18, 1906.

PITTSBURG COUNTY,
State of Oklahoma:

I, J. M. Gannaway, City Clerk of the City of McAlester, hereby certify that the above and foregoing is a full, true and correct copy of the original Resolution No. 1 adopted by the Mayor and City Council of the City of McAlester, on the 5th day of April, 1909, and the same appears on record on page 618 of the Record of Council

Proceedings No. 2 of the City of McAlester, in the office of the City Clerk.

Dated at McAlester, Oklahom, this 23rd day of April, 1909.

(Signed) J. M. Gannaway, City Clerk. (Seal.)

[fol. 130] DEF'TS' EX. 2

M., K. & T. Resolution No. 2

Resolved, That the bill of the Missouri, Kansas & Texas Railway Company against the City of McAlester for street crossings constructed in accordance with Ordinance No. 74, entitled: "An ordinance to provide for street crossings across the right of way, station grounds and tracks of the Missouri, Kansas & Texas Railway Company, in the city of South McAlester, upon the lines of certain streets as laid out by the Townsite Commission's surveys, in lieu of other crossings now in use, and which, upon the completion of the new crossings herein provided for, shall be vacated and closed; and for other purposes:" for Sixty-five and 65/100 ($65.65) Dollars for the undergrade crossing at Delaware Avenue, and for Five Thousand Five Hundred and Eighteen and 4/100 ($5,518.04) Dollars for the Grand Avenue bridge, and Three Thousand Seven Hundred and Fifty and no/00 ($3,750.00) for the undergrade crossing at Cherokee Avenue, be accepted as the true and correct amount in each instance due from the City of McAlester to the Missouri, Kansas & Texas Railway Company on account of said crossings as so constructed under said Ordinance No. 74.

PITTSBURG COUNTY,
State of Oklahoma:

I, J. M. Gannaway, City Clerk of the City of McAlester, hereby certify that the above and foregoing is a full, true and correct copy of the original Resolution No. 2 adopted by the Mayor and City Council of the City of McAlester, on the 12th day of April, 1909, and the same appears on record on page- 628 and 629 of the Record of Council Proceedings No. 2 of the City of McAlester, in the office of the City Clerk.

Dated at McAlester, Oklahoma, this 23rd day of April, 1909.

(Signed) J. M. Gannaway, City Clerk. (Seal.)

[fol. 131] DEF'TS' EX. 3

M., K. & T. Resolution No. 3

Resolved, That the City Clerk be directed to issue a warrant in favor of the Missouri, Kansas & Texas Railway Company, equal to the amount of taxes levied against the property of the said Railway Company by the City of McAlester for taxes due for the year 1906,

to-wit: the sum of Eighteen Hundred and Fifteen ($1,815.00) Dollars, the amount of said warrant to apply as a credit on the one-half of the cost of the Delaware Avenue crossing and the Grand Avenue crossing, in accordance with the terms of Ordinance Number Seventy-four, entitled: "An ordinance to provide for street crossings across the right of way, station grounds and tracks of the Missouri, Kansas & Texas Railway Company, in the City of South McAlester, upon the lines of certain streets as laid out by the Townsite Commission's surveys, in lieu of other crossings now in use, and which, upon the completion of the new crossings herein provided for, shall be vacated and closed, and for other purposes." The amount so due from this City on the Delaware crossing being sixty-five and 65/100 Dollars ($65.65), and the amount so due from this city on the Grand Avenue crossing being Five Thousand Five Hundred Eighteen and 4/100 ($5,518.04) Dollars; and that said warrant be received by B. P. Hammond, Acting City Attorney, in full payment of all taxes due by the Missouri, Kansas & Texas Railway Company to the City of McAlester for the year 1906.

Pittsburg County,
State of Oklahoma:

I, J. M. Gannaway, City Clerk of the City of McAlester, hereby certify that the above and foregoing is a full, true and correct copy of the original Resolution No. 3 adopted by the Mayor and City Council of the City of McAlester, on the 13th day of April, 1909, and the same appears on record on pages 630 of the Record of Council Proceedings No. 2, of the City of McAlester, in the office of the City Clerk.

Dated at McAlester, Oklahoma, this 23rd day of April, 1909.

(Signed) J. M. Gannaway, City Clerk. (Seal.)

[fol. 132] Def'ts' Ex. 4

Resolved, That the City Clerk be directed to issue a warrant in favor of the Missouri, Kansas & Texas Railway Company equal to the amount of taxes levied against the property of the said Railway Company by the City of McAlester for taxes due for the year 1907, in the sum of Eighteen Hundred and fifteen ($1,815.00) Dollars, the amount of said warrant to apply as a credit on the amount due from the City of McAlester to the said Missouri, Kansas & Texas Railway Company because of the construction of the Cherokee Avenue crossing in accordance with the terms of Ordinance No. 74, entitled: "An ordinance to provide for street crossings across the right-of-way, station grounds and tracks of the Missouri, Kansas & Texas Railway Company, in the City of South McAlester, upon the lines of certain streets as laid out by the Townsite Commission's surveys, in lieu of other crossings now in use, and which, upon the completion of the new crossings herein provided for, shall be vacated

and closed; and for other purposes." The amount so due from the City to the said Railway Company on account of the Cherokee Avenue crossing being Three Thousand Seven Hundred and Fifty and No/100 ($3,750.00) Dollars; and that said warrant be received by B. P. Hammond, Acting City Attorney, in full of all taxes due from said Missouri, Kansas and Texas Railway Company to said City of McAlester for the year 1907.

PITTSBURG COUNTY,
State of Oklahoma:

I, J. M. Gannaway, City Clerk of the City of McAlester, hereby certify that the above and foregoing is a full, true and correct copy of the original Resolution No. 4 adopted by the Mayor and City Council of the City of McAlester, on the 13th day of April, 1909, and the same appears on record on pages 630 and 631 of the Record of Council Proceedings No. 2 of the City of McAlester, in the office of the City Clerk.

Dated at McAlester, Oklahoma, this 23rd day of April, 1909.

(Signed) J. M. Gannaway, City Clerk. (Seal.)

[fol. 133] DEF'TS' EX. 5

Ordinance No. 74

An Ordinance to provide for street crossings across the right of way, station grounds and tracks of the Missouri, Kansas & Texas Railway Company, in the City of South McAlester, upon the lines of certain streets as laid out by the Townsite Commission's surveys in lieu of other crossings now in use, and which, upon completion of the new crossings herein provided for, shall be vacated and closed; and for other purposes:

Be it ordained by the Council of the City of South McAlester:

Section 1. That Monroe Avenue, Grand Avenue, Delaware Avenue, and Miami Avenue, shall be and hereby are opened across and over the right of way, station grounds and tracks of the Missouri, Kansas & Texas Railway Company, in the city of South McAlester by grade crossings at Monroe and Miami Avenues, and by an overgrade crossing at Grand Avenue, and by an undergrade crossing of the main and passing tracks at Delaware Avenue, and by a grade crossing of the side tracks now constructed, and those hereafter to be constructed at Delaware Avenue, all as hereinafter provided:

Section 2. The expense of constructing said grade crossings at Monroe and Miami Avenues shall be borne by the Missouri, Kansas & Texas Railway Company, and said crossings shall be constructed by said Railway Company, plank in its tracks on the inside by planks thirty feet long and three inches thick, and one plank on the outside of its rails of the same length and thickness;

Section 3. The overhead crossing at Grand Avenue shall be by a two span iron bridge, resting on two abutments and one pier upon the right of way or grounds of the said Railway Company, according to plans to be prepared by the City, but subject to the approval of the said Railway Company.

Section 4. The crossing at Delaware Avenue shall be by planking the side tracks, as in section two (2) hereof, and by an ordinary dirt road under bridge number three hundred and twenty-six (326) of the said Railway Company, and between the bents on the north side of the present water way, the grade of said undergrade crossing to be about six feet above the bed of the present water course.

Section 5. In consideration of the Missouri, Kansas & Texas Railway Company agreeing to the opening of said streets across its said right of way, station grounds and tracks, aforesaid, and its paying for the construction of said grade crossings at Monroe and Miami Avenues as in section two herein provided, and its agreeing to the erection and maintenance of said bridge across its said right of way, station grounds and tracks at Grand Avenue, as aforesaid, and its further agreement to furnish, in the first instance the necessary material and labor for constructing said Grand Avenue bridge for the City, as well as the necessary labor and material for opening the crossing at Delaware Avenue, as in Section four hereof provided and its further agreement to contribute to the City one-half of the actual cost of said Grand Avenue bridge and said crossing at Delaware Avenue, the City hereby agrees to vacate and forever close the present grade crossing over the railway company's tracks at or near the [fol. 134] alley shown on the townsite commission's map, and lying between Grand Avenue and Choctaw Avenue, and extending through Block Number three hundred and fifty one (351), and also to vacate and close all other crossings over said railway company's tracks, except those herein provided for, and upon the completion of said crossings herein provided for, all other crossings, including the present grade crossings between Grand Avenue and Choctaw Avenue, shall be and hereby are vacated and closed; and the city further agrees that it will hereafter open no other street crossings or alleyways over, across or under the right of wa-, station grounds and tracks of the said railway company, except and provided it shall pay to the said railway company, as agreed stipulated and liquidated damages in any proceedings instituted by the said City for the opening or condemnation of a right of way over across or under the right of way, station grounds and tracks of the said railway company, any judgment, finding, verdict or assessment of damages of any court, jury, commission or other tribunal at the time having authority to assess said damages to the contrary notwithstanding, and whether for more or less than the agree- sum, namely:

Should Choctaw Avenue be opened over, across or under the right of way, tracks and station grounds of the railway company, the City shall pay the said railway company as agreed, stipulated

and liquidated damages, in the sum of Twenty Thousand Dollars ($20,000.00).

Should any other crossing, alley way or street be opened across the railway company's premises through block number three hundred and fifty one (351), the City shall pay to the Railway Company, as agreed, stipulated and liquidated damages — the sum of fifteen thousand dollars ($15,000.00).

Should any other street or alley way except Washington Avenue or Comanche Avenue, be opened across, over or under the right of way, station grounds, and tracks of the Railway Company, the City shall pay to the said Railway Company as agreed, stipulated and liquidated damages, the sum of ten thousand dollars ($10,000.00) for each and every other of said crossings, and in addition thereto damages equal to the actual value of any buildings or other improvements of the railway company damaged or destroyed by the opening of any street or crossing; provided that nothing herein contained shall constitute a waiver on the part of the railway company to contest the opening of any additional streets other than those herein provided for.

Section 6. The City of South McAlester shall and hereby agrees to pay to the said Missouri, Kansas & Texas Railway Company, one half of the actual cost of the construction of said Grand Avenue and Delaware Avenue crossings, as above provided for, when and as soon as the city of South McAlester has the lawful right to collect from the said Missouri, Kansas & Texas Railway Company, taxes levied against its right of way, buildings and other improvements or property in the city of South McAlester, in annual installments equal to the amounts of the taxes that may be collected by the said City from the said railway Company as taxes until said annual installments or sums so paid by the said City of South McAlester to the said Railway Company shall equal one-half of the actual cost of the [fol. 135] said Grand Avenue and Delaware Avenue crossings; provided that upon the completion of said crossings, the said railway Company shall render to the City a bill showing the actual cost of said crossings, and the proportion thereof so to be paid by the City.

Section 7. It is understood and agreed, however, that, if at any time, after five years from the date of the passage of this ordinance, the City of South McAlester shall desire an undergrade crossing at Cherokee Avenue, and the crossing at Delaware Avenue herein provided for shall be vacated and closed that the railway shall consent that said undergrade crossing at Cherokee Avenue shall be constructed, and contribute towards the construction thereof, one-half of the actual cost thereof, provided said crossing can be constructed at a cost not to exceed seven thousand and five hundred dollars ($7,500.00) but should said crossing cost more than seven thousand and five hundred dollars ($7,500.00) then said railway company shall in addition thereto, contribute the entire cost of said crossing over and above the sum of three thousand and seven hundred and fifty dollars ($3,750.00) which is to be the maximum sum paid by

the City. And said crossing at Cherokee Avenue shall be made by planking the side tracks as provided in Section Two hereof, and by an ordinary dirt road under the main and other tracks of said road built upon the top of the fill of said road, and above the present grade of said Cherokee Avenue. The proportion of the cost of said Cherokee Avenue crossing to be paid by the City in annual installments in the manner provided in Section Six of this Ordinance, for other crossings; but the amount to be paid by the City in any one year to said Railway Company on account of the construction of said crossing not to exceed the amount of taxes so as hereinabove provided, to be paid in any one year by said railway company to the City. Provided, however, that should Delaware Avenue be closed, as hereinabove provided, the City of South McAlester shall have the right to pass its sewer pipes under the tracks of the said railway company at the place herein provided for. Delaware Avenue crossing said right of way, and the said Railway Company shall have the right to connect its sewers with the said sewers of the City of South McAlester at any point where said sewers shall cross through said right of way of said railway company, under plans and specifications to be approved by the said Missouri, Kansas & Texas Railway Company, and provided further, that it is hereby understood and agreed that should the City of South McAlester desire to construct such crossing at Cherokee Avenue across the right of way of said railway company, at any time, prior to the five years from the date of the passage of this Ordinance, it may do so, at its sole expense, under plans and specifications to be approved by the said Railway Company.

Section 8. The overgrade bridge crossing at Grand Avenue shall be and remain the exclusive property of the City of South McAlester.

Section 9. It is hereby understood and agreed that if at any time in the future, the City of South McAlester shall desire to open and establish a crossing of Comanche Avenue or Washington Avenue, or both of them, across the right of way and station grounds of the said Railway Company that it may do so upon the following terms: the crossing at Comanche Avenue shall be constructed as an under grade crossing under the main and other tracks of the said railway [fol. 136] company located upon the fill of said company, and above the present grade of Comanche Avenue, and a grade crossing over any side tracks of the said railway company, that now exist or that may be hereafter established upon the grade of said Comanche Avenue; and the crossing at Washington Avenue shall be an overhead bridge crossing, and both of said crossings, at Comanche Avenue and Washington Avenue, shall be constructed upon plans and specifications to be approved by the said railway Company, and at the sole cost and expense of the said City of South McAlester. The Railway Company hereby agreeing in consideration of the other matters and things expressed in this Ordinance, to waive any and all claims for damages because of the opening and establishing of either or both of said Comanche and Washington Avenue crossings.

And it is further understood and agreed that the said over grade bridge if it shall be built at Washington Avenue, shall be and remain the exclusive property of the City of South McAlester.

Section 10. This Ordinance shall be in full force and effect from and after its passage and publication, and the written acceptance of the same on the part of the Missouri, Kansas & Texas Railway Company, acting through its Vice President and General Manager, has been filed with the Clerk of the City of South McAlester.

Passed and approved this 8th day of November, 1901.
Fielding Lewis, Mayor. A. A. Powe, City Clerk.

The above entitled Ordinance, number 74 entitled "An Ordinance to provide for street crossings across the right of way, station grounds and tracks of the Missouri, Kansas & Texas Railway Company, in the City of South McAlester, upon the lines of certain streets as laid out by the townsite Commission's survey in lieu of other crossings now in use, and which, upon the completion of the new crossings herein provided for, shall be vacated and closed, and for other purposes" passed by the Council and approved by the Mayor of the City of South McAlester, on the 8th day of November, A. D. 1901, hereby accepted by the said Missouri, Kansas & Texas Railway Company, and this acceptance is endorsed upon the original Ordinance and is to be filed with the Clerk of the City of South McAlester in accordance with Section 10 of said Ordinance.

Missouri, Kansas & Texas Railway Company, by A. A. Allen,
Its Vice President & General Manager.

[fol. 137] STATE OF OKLAHOMA,
County of Pittsburg,
City of McAlester, ss:

I, Rose D. Ewens, City Clerk in and for the City of McAlester, Oklahoma, hereby certify that the attached Ordinance No. 74, is a true and correct copy of Ordinance No. 74 as recorded in Ordinance Book No. 1 on pages No. 142 to 147 inclusive.

Witness my hand and seal this 15th day of October, 1921.
(Signed) Rose D. Ewens, City Clerk. (Seal.)

[fol. 138] D'F'T EX. 6

IN THE SUPERIOR COURT WITHIN AND FOR PITTSBURG COUNTY, STATE OF OKLAHOMA

No. —

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Plaintiff,

vs.

CITY OF MCALESTER, Defendant

Petition

1. Comes now the Missouri, Kansas & Texas Railway Company, plaintiff herein, and shows to the court that it is a corporation organized and existing under and by virtue of the laws of the State of Kansas, and does now and at all times hereinafter mentioned has owned, operated and controlled lines of railway into and through the states of Missouri, Kansas and Oklahoma, formerly Indian Territory, and amongst others a line of railway into and through the City of McAlester, Pittsburg County, Oklahoma, formerly Indian Territory, and that the defendant, the City of McAlester is a municipal corporation organized and existing under and by virtue of the laws of the State of Oklahoma.

2. For cause of action against defendant, plaintiff states that heretofore, to-wit: on the 8th day of November, 1901, this plaintiff entered into a contract with the City of South McAlester, Indian Territory, providing for street crossings across the right of way, station grounds and tracks of this plaintiff in said city upon the lines of certain streets as laid out by the Townsite Commission survey of the United States, which said contract is contained in Ordiance No. 74, passed and approved on said date by the Council of said City, a copy of which said ordinance is attached hereto, marked "Exhibit A" and made a part of this petition.

[fol. 139] 3. Further complaining, plaintiff states that it was provided in said contract amongst other things that Grand Avenue and Delaware Avenue should be opened across and over the right of way, station grounds and tracks of this plaintiff in said City by an overgrade crossing at Grand Avenue and by an undergrade crossing of the main and passing tracks and a grade crossing of the side tracks then constructed and thereafter to be constructed at Delaware Avenue, and that the said crossings should be constructed in accordance with the terms of said contract and that in consideration of the matters and things set up in said contract it was further agreed that the said City of South McAlester should pay this plaintiff one-half of the actual cost of the construction of said Grand Avenue and said Delaware Avenue crossings as therein provided, when and as soon as said City had the lawful right to collect from

this plaintiff taxes levied against its right of way, buildings and other improvements and other property in said City, said payment to be made in annual installments equal to the amounts of such taxes that might be collected by the said City from this plaintiff until said annual installments or sums so paid by said city to this plaintiff should equal one-half of the actual cost of the said Grand Avenue and the said Delaware Avenue crossings; and that upon the completion of said crossings this plaintiff should render to the said City a bill showing the actual cost of said crossings and the proportion thereof so to be paid by said City.

4. Further complaining, plaintiff states that it was further provided by the terms of said contract that if at any time after five years said City should desire an undergrade crossing at Cherokee Avenue that this plaintiff should consent to same, and that said City should contribute one-half to the cost of the construction thereof, provided said crossing should be constructed at not to exceed [fol. 140] a cost of $7,500.00, but that if said crossing should cost more than $7,500.00, this plaintiff should pay all additional cost over and above $3,750.00, which sum should be the maximum to be paid by the said City, said crossing to be constructed as in said contract provided, and the proportion of the cost thereof to be paid by said City should be paid in the same manner as provided for the payment of its proportion of the cost of Grand Avenue and Delaware Avenue crossings, and plaintiff states that thereafter and about the year 1907, said Cherokee Avenue was opened and said crossing constructed in accordance with the terms of said contract. Plaintiff states that it was further provided by the terms of said contract that the amount to be paid by said City in any one year to this plaintiff on account of the construction of said crossing should not exceed the amount of taxes to be paid in any one year by this plaintiff to said City, as therein stated.

5. Further complaining, plaintiff states that said crossings at said Grand Avenue, Delaware Avenue and Cherokee Avenue were constructed in accordance with the terms of said contract at a total cost as follows:

Delaware Avenue	$131.30
Grand Avenue	11,036.08
Cherokee Avenue	8,009.05
	$19,176.43

and that thereafter the City of McAlester, a corporation organized and existing under the laws in force in the Indian Territory having become the successor to the said City of South McAlester, this plaintiff presented to the Mayor and City Council its bill for one-half of the cost of the construction of said Delaware Avenue and said Grand Avenue crossings, and for $3,750.00 for the cost of construction of Cherokee Avenue crossing, being the proportion agreed upon to be paid by said City of South McAlester, as provided in said con-

[fol. 141] tract, which proportionate amounts as shown by said bill were as follows:

Delaware Avenue	$65.65
Grand Avenue	5,518.04
Cherokee Avenue	3,750.00
Total	$9,333.69

and that said Mayor and City Council of said City of McAlester, by resolution adopted on the 12th day of April, 1909, accepted said bill as true and correct amount in each instance due from the said City of McAlester to this plaintiff on account of said construction of said crossing in accordance with the provisions of said contract, a copy of which resolution is hereto attached, marked "Exhibit B" and made a part of this petition.

6. Further complaining, plaintiff states that in accordance with the provisions of said contract, said City of McAlester, did on or about the 13th day of April, 1909, pay to this plaintiff the sum of $1,815.00, to apply as a credit on the amount due from said City to this plaintff because of the construction of said Delaware Avenue crossing, and said Grand Avenue crossing, as provided in said contract, said amount being equal to the amount of taxes charged against this plaintiff by said City for the year 1906, and plaintiff states that it credited said amount on the total amount of $65.65 due from said City to this plaintiff because of the construction of said Delaware Avenue crossing, and on the total amount of $5,518.04 due from said City to this plaintiff because of the construction of said Grand Avenue crossing, thus leaving no balance due this plaintiff on said Delaware Avenue crossing, and leaving a balance of $3,768.69 due from said City to this plaintiff on said account because of the construction of said Grand Avenue crossing, which action of said City in making said payment is more fully shown by a resolution adopted by the Mayor and Council thereof on said date, a copy of which resolution is attached h-reto, marked "Exhibit C" [fol. 142] and made a part of this complaint.

7. Further complaining, plaintiff states that in accordance with the provisions of said contract said City did on or about the 13th day of April, 1909, pay to this plaintiff the sum of $1,815.00 to apply as a credit on the amount due from said City to this plaintiff because of the construction of said Cherokee Avenue crossing as provided in said contract, said amount being equal to the amount of taxes charged against this plaintiff by said City for the year 1907, and plaintiff states that it credited said payment on the total amount of $3,750.00 due from said City to this plaintiff, because of the construction of said Cherokee Avenue crossing, leaving a balance due on said account of $1,935.00, which action of said City in so making said payment is more fully shown by a resolution adopted on said date, a copy of which is attached hereto, marked "Exhibit D" and made a part of this complaint. Plaintiff states that the total

balance due this plaintiff from said City after receipt of said last above mentioned payment, was $5,703.69.

8. Further complaining, plaintiff states that the defendant herein is the successor to said City of McAlester, and has succeeded to all of the rights, privileges, duties and liabilities of said City of McAlester as contained in said contract bearing Ordinance No. 74, as above alleged, and plaintiff states that it has paid as taxes assessed against it for the use and benefit of said defendant for the period beginning November 16, 1907, and ending June 30, 1909, the sum of $3,701.99, which payment was made by voucher dated September 30, 1910, and plaintiff states that at the time said payment was made there then became due from the defendant to this plaintiff under the provisions of said contract a like sum to apply on said bill for the cost of the construction of said crossing, which [fol. 143] if paid would leave a balance of $2,001.70 still due this plaintiff, but that defendant has wholly failed and refused to pay same or any part thereof, although often requested so to do by this plaintiff.

9. Further complaining, plaintiff states that it has paid to this defendant as taxes assessed against it for the use and benefit of said defendant for the period beginning July 1, 1909, and ending June 30, 1910, the further sum of $7,930.73, which payment was made by voucher dated — day of ——, 1910, and plaintiff states that at the time said payment was made there then became due from this defendant to this plaintiff under the provisions of said contract the further sum of $2,001.70 in full of the balance of said bill on account of the construction of said crossings, but that defendant has wholly failed and refused to pay the same or any part thereof, although often requested so to do by this plaintiff.

10. Further complaining, plaintiff states that it has fully performed all of the terms and conditions of said contract by it to be performed, but that the defendant has wholly failed to perform the terms of said contract agreed by it to be performed.

11. Further complaining, plaintiff states that the total amount now due from this defendant to plaintiff is $5,703.69, as above alleged, claim for which in writing with a full account of the items and verified by oath of the agent of this plaintiff, that the same is correct, reasonable and just, was presented by this plaintiff to the defendant on the — day of —— in accordance with the statutes in such cases made and provided, and payment thereof has been refused by said defendant.

Wherefore, Plaintiff prays for judgment against the defendant for the sum of $5,703.69, with interest from date of judgment at the rate of six per cent per annum, until paid, and for all of its costs herein laid out and expended.

(Signed) Clifford L. Jackson, Andrews & Day, Attorneys for Plaintiff.

[fol. 144] Ordinance No. 74

An ordinance to provide for street crossings across the right of way, station grounds and tracks of the Missouri, Kansas & Texas Railway Company, in the City of South McAlester, upon the lines of certain streets as laid out by the Townsite Commission's surveys in lieu of other crossings now in use, and which, upon completion of the new crossings herein provided for, shall be vacated and closed, and for other purposes.

Be it ordained by the Council of the City of South McAlester:

Section 1. That Monroe Avenue, Grand Avenue, Delaware Avenue, and Miami Avenue, shall be and hereby are opened across and over the right of way, station grounds and tracks of the Missouri, Kansas & Texas Railway Company, in the city of South McAlester by grade crossings at Monroe and Miami Avenues, and by an overgrade crossing at Grand Avenue, and by an undergrade crossing of the main and passing tracks at Delaware Avenue, and by a grade crossing of the side tracks now constructed, and those hereafter to be constructed at Delaware Avenue, all as hereinafter provided:

Section 2. The expense of constructing said grade crossings at Monroe and Miami Avenues shall be borne by the Missouri, Kansas & Texas Railway Company, and said crossings shall be constructed by said Railway Company, plank in its tracks on the inside by planks thirty feet long and three inches thick, and one plank on the outside of its rails of the same length and thickness:

Section 3. The overhead crossing at Grand Avenue shall be by a two span iron bridge, resting on two abutments and one pier upon the right of way or grounds of the said Railway Company, according to plans to be prepared by the City, but subject to the approval of the said Railway Company.

Section 4. The crossing at Delaware Avenue shall be by planking the side tracks, as in section two (2) hereof, and by an ordinary dirt road under bridge number three hundred and twenty-six (326) of the said Railway Company, and between the bents on the north side of the present water way, the grade of said undergrade crossing to be about six feet above the bed of the present water course.

Section 5. In consideration of the Missouri, Kansas & Texas Railway Company agreeing to the opening of said streets across its said right of way, station grounds and tracks, aforesaid, and its paying for the construction of said grade crossings at Monroe and Miami Avenues as in section two herein provided, and its agreeing to the erection and maintenance of said bridge across its said right of way, station grounds and tracks at Grand Avenue, as aforesaid, and its further agreement to furnish, in the first instance the necessary material and labor for constructing said Grand Avenue bridge for

the City, as well as the necessary labor and material for opening the crossing at Delaware Avenue, as in Section four hereof provided and its further agreement to contribute to the City one-half of the actual cost of said Grand Avenue bridge and said crossing at Delaware Avenue, the City hereby agrees to vacate and forever close the present grade crossing over the railway company's tracks at or near the alley shown on the townsite commission's map, and lying be- [fol. 145] tween Grand Avenue and Choctaw Avenue, and extending through Block Number three hundred and fifty one (351), and also to vacate and close all other crossings over said railway company's tracks, except those herein provided for, and upon the completion of said crossings herein provided for, all other crossings, including the present grade crossings between Grand Avenue and Choctaw Avenue, shall be and hereby are vacated and closed; and the city further agrees that it will hereafter open no other street crossings or alleyways over, across or under the right of wa-, station grounds and tracks of the said railway company, except and provided it shall pay to the said railway company, as agreed stipulated and liquidated damages in any proceedings instituted by the said City for the opening or condemnation of a right of way over across or under the right of way, station grounds and tracks of the said railway company, any judgment, finding, verdict or assessment of damages of any court, jury, commission or other tribunal at the time having authority to assess said damages to the contrary notwithstanding, and whether for more or less than the agree- sum, namely:

Should Choctaw Avenue be opened over, across or under the right of way, tracks and station grounds of the railway company, the City shall pay the said railway company as agreed, stipulated and liquidated damages, in the sum of Twenty Thousand Dollars ($20,-000.00).

Should any other crossing, alley way or street be opened across the railway company's premises through block number three hundred and fifty one (351), the City shall pay to the Railway Company, as agreed, stipulated and liguidated damages the sum of fifteen thousand dollars ($15,000.00).

Should any other street or alley way except Washington Avenue or Comanche Avenue, be opened across, over or under the right of way, station grounds, and tracks of the Railway Company, the City shall pay to the said Railway Company as agreed, stipulated and liquidated damages, the sum of ten thousand dollars ($10,-000.00) for each and every other of said crossings, and in, addition thereto damages equal to the actual value of any buildings or other improvements of the railway company damaged or destroyed by the opening of any street or crossing; provided that nothing herein contained shall constitute a waiver on the part of the railway company to contest the opening of any additional streets other than those herein provided for.

Section 6. The City of South McAlester shall and hereby agrees to pay to the said Missouri, Kansas & Texas Railway Company, one half

of the actual cost of the construction of said Grand Avenue and Delaware Avenue crossings, as above provided for, when and as soon as the city of South McAlester has the lawful right to collect from the said Missouri, Kansas & Texas Railway Company, taxes levied against its right of way, buildings and other improvements or property in the city of South McAlester, in annual installments equal to the amounts of the taxes that may be collected by the said City from the said railway Company as taxes until said annual installments or sums so paid by the said City of South McAlester to the said Rail-[fol. 146] way Company shall equal one-half of the actual cost of the said Grand Avenue and Delaware Avenue crossings: provided that upon the completion of said crossings, the said railway Company shall render to the City a bill showing the actual cost of said crossings, and the proportion thereof so to be paid by the City.

Section 7. It is understood and agreed, however, that, if at any time, after five years from the date of the passage of this ordinance, the City of South McAlester shall desire an undergrade crossing at Cherokee Avenue, and the crossing at Delaware Avenue herein provided for shall be vacated and closed that the railway shall consent that said undergrade crossing at Cherokee Avenue shall be constructed, and contribute towards the construction thereof, one-half of the actual cost thereof, provided said crossing can be constructed at a cost not to exceed seven thousand and five hundred dollars ($7,500.00) but should said crossing cost more than seven thousand and five hundred dollars ($7,500.00) then said railway company shall in addition thereto, contribute the entire cost of said crossing over and above the sum of three thousand and seven hundred and fifty dollars ($3,750.00) which is to be the maximum sum paid by the City. And said crossing at Cherokee Avenue shall be made by planking the side tracks as provided in Section Two hereof, and by an ordinary dirt road under the main and other tracks of said road built upon the top of the fill of said road, and above the present grade of said Cherokee Avenue. The proportion of the cost of said Cherokee Avenue crossing to be paid by the City in annual installments in the manner provided in Section Six of this Ordinance, for other crossings; but the amount to be paid by the City in any one year to said Railway Company on account of the construction of said crossing not to exceed the amount of taxes so as hereinabove provided, to be paid in any one year by said railway company to the City. Provided, however, that should Delaware Avenue be closed, as hereinabove provided, the City of South McAlester shall have the right to pass its sewer pipes under the tracks of the said railway company at the place herein provided for. Delaware Avenue crossing said right of way, and the said Railway Company shall have the right to connect its sewers with the said sewers of the City of South McAlester at any point where said sewers shall cross through said right of way of said railway company, under plans and specifications to be approved by the said Missouri, Kansas & Texas Railway Company, and provided further, that it is hereby understood and agreed that should the City of

South McAlester desire to construct such crossing at Cherokee Avenue across the right of way of said railway company, at any time, prior to the five years from the date of the passage of this Ordinance, it may do so, at its sole expense, under plans and specifications to be approved by the said Railway Company.

Section 8. The overgrade bridge crossing at Grand Avenue shall be and remain the exclusive property of the City of South McAlester.

Section 9. It is hereby understood and agreed that if at any time in the future, the City of South McAlester shall desire to open and establish a crossing of Comanche Avenue or Washington Avenue, or both of them, across the right of way and station grounds of the said Railway Company that it may do so upon the following terms: The crossing at Comanche Avenue shall be constructed as an under- [fol. 147] grade crossing under the main and other tracks of the said railway company located upon the fill of said company, and above the present grade of Comanche Avenue, and a grade crossing over any side tracks of the said railway company, that now exist or that may be hereafter established upon the grade of said Comanche Avenue; and the crossing at Washington Avenue shall be an overhead bridge crossing, and both of said crossings, at Comanche Avenue and Washington Avenue, shall be constructed upon plans and specifications to be approved by the said railway Company, and at the sole cost and expense of the said City of South McAlester. The Railway Company hereby agreeing in consideration of the other matters and things expressed in this Ordinance, to waive any and all claims for damages because of the opening and establishing of either or both of said Comanche and Washington Avenue crossings. And it is further understood and agreed that the said over grade bridge if it shall be built at Washington Avenue, shall be and remain the exclusive property of the City of South McAlester.

Section 10. This Ordinnce shall be in full force and effect from and after its passage and publication, and the written acceptance of the same on the part of the Missouri, Kansas & Texas Railway Company, acting through its Vice President and General Manager, has been filed with the Clerk of the City of South McAlester.

Passed and approved this 8th day of November, 1901.

Fielding Lewis, Mayor. A. A. Powe, City Clerk.

The above entitled Ordinance, number 74 entitled "An Ordinance to provide for street crossings across the right of way, station grounds and tracks of the Missouri, Kansas & Texas Railway Company, in the City of South McAlester, upon the lines of certain streets as laid out by the townsite Commission's survey in lieu of other crossings now in use, and which, upon the completion of the new crossings herein provided for, shall be vacated and closed, and for other purposes" passed by the Council and approved by the Mayor of the City of South McAlester, on the 8th day of November, A. D. 1901, hereby accepted by the said Missouri, Kansas & Texas Railway Com-

pany, and this acceptance is endorsed upon the original Ordinance and is to be filed with the Clerk of the City of South McAlester in accordance with Section 10 of said Ordinance.

Missouri, Kansas & Texas Railway Company, by A. A. Allen, Its Vice President & General Manager.

[fol. 148] EXHIBIT B TO PETITION

M., K. & T. Resolution No. 2—Omitted; printed side page 130 ante

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[fol. 149] EXHIBIT C TO PETITION

M., K. & T. Resolution No. 3—Omitted; printed side page 131 ante

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[fol. 150] EXHIBIT D TO PETITION

M., K. & T. Resolution No. 4—Omitted; printed side page 132 ante

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[fol. 151] IN THE SUPERIOR COURT WITHIN AND FOR PITTSBURG COUNTY, STATE OF OKLAHOMA

No. —

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Plaintiff,

vs.

THE CITY OF MCALESTER, Defendant

ANSWER

Comes now the defendant by its duly appointed, qualified and acting attorney, and for answer to plaintiff's petition filed herein admits each and every material allegation thereof, and agrees that judgment may be rendered in favor of the plaintiff and against this defendant for the sum of $5,703.69, with interest from date of judgment at six per cent, until paid, and for all costs of this suit, and prays the court that it be provided in said judgment that same shall be paid by defendant in three equal annual installments.

Wherefore, having fully answered, defendant prays that it be adjudged to go hence without day with its costs in this behalf laid out and expended.

T. D. Davis, Attorney for Defendant.

[fol. 152] Resolution

A resolution authorizing and instructing the City Attorney to appear on behalf of the City of McAlester, defendant in a suit entitled Missouri, Kansas & Texas Railway Company, plaintiff, v. The City of McAlester, defendant, now pending in the Superior Court of Pittsburg County, Oklahoma, and to file answer admitting the allegations of plaintiff's petition and confessing judgment for the amount sued for, interest and costs, and for other purposes.

Whereas, on the 5th day of February, 1912, the Missouri, Kansas & Texas Railway Company commenced suit in the Superior Court within and for Pittsburg County, Oklahoma, against the City of McAlester, which case bears No. — on the docket of said court, in which suit the said Railway Company is seeking to recover from said City the sum of $5,703.69, as a balance due on account of the construction of street crossings over the right of way, station grounds and tracks of said Railway Company in said City in accordance with the terms of a contract entered into between the Railway Company and said City on the 8th day of November, 1901, as contained in Ordinance No. 74, which ordinance is entitled as follows: "An ordi-ance to provide for street crossings across the right of way, station grounds and tracks of the Missouri, Kansas & Texas Railway Company, in the City of South McAlester, upon the lines of certain streets as laid out by the Townsite Commission's surveys in lieu of other crossings now in use, and which, upon the completion of the new crossings herein provided for, shall be vacated and closed; and for other purposes," and,

Whereas, it appears that heretofore, to-wit: on the 14th day of August, 1911 said Railway Company presented to the then Mayor and Council of said City its bill against the City for its proportionate share of said expenses provided under the terms of said contract to be paid by said City, which bill was by said Mayor and council found to [fol. 153] be just and true and due from it to said Railway Company, all of which more fully appears from a resolution adopted by them on the — day of ——, and,

Whereas, it appears that in the month of April, 1909, said City paid on said bill the sum of $3,630.00 to said Railway Company, thereby leaving a balance due in the sum of $5,703.69,

Be it therefore resolved by the City Council of the City of McAlester, that T. D. Davis the duly elected, qualified and acting City Attorney of said City, be and he is hereby authorized and instructed to appear on behalf of said City in said suit in said Court, and file answer therein admitting said indebtedness and confessing judgment therefor for the full amount sued for with interest from date of judgment at six per cent per annum until paid, and costs.

Passed and approved this 8th day of March, 1912.

Pete Hanraty, Mayor. J. M. Gannaway, City Clerk.

STATE OF OKLAHOMA,
Pittsburg County,
City of McAlester, ss:

I, J. M. Gannaway, the duly appointed, qualified and acting City Clerk of the City of McAlester hereby certify that the above and foregoing is a correct, full and true copy of a resolution duly passed by the City Council, and approved by the Mayor, of the City of McAlester, as the same appears of record in my office, passed and approved on the date therein named.

J. M. Gannaway, City Clerk of the said City of McAlester.

[fol. 154] IN THE SUPERIOR COURT WITHIN AND FOR PITTSBURG COUNTY, STATE OF OKLAHOMA

No. 1098

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Plaintiff,

vs.

CITY OF MCALESTER, Defendant

JOURNAL ENTRY OF JUDGMENT

Now on this 17th day of April 1912 same being one of the regular judicial days of the regular April 1912 term of this court, the above entitled cause comes on for hearing, and good and lawful service of summons having been heretofore had on defendant herein, both parties being present and it appearing to the court that defendant has filed answer herein admitting all the allegations of plaintiff's petition and agreeing that judgment may be entered in its favor for the amount sued for with interest from the date of judgment and costs, and the court having seen all the pleadings on file and being fully advised in the premises.

It is considered, ordered and adjudged that the plaintiff, Missouri, Kansas & Texas Railway Company, have and recover of and from the defendant, City of McAlester, the sum of Five Thousand Seven Hundred Three and 69/100 ($5,703.69) Dollars, with interest thereon from the date thereof at six per cent per annum until paid, and all costs incurred in this case.

W. C. Liedtke, Judge.

[fols. 155 & 156] CLERK'S CERTIFICATE

STATE OF OKLAHOMA,
Pittsburg County, ss:

I, H. I. Aston, do hereby certify that I am the Court Clerk in and for Pittsburg County, State of Oklahoma, and that the foregoing is a

true, correct and complete copy of Petition, Answer and Journal Entry in Case No. 1098, Missouri, Kansas & Texas Railway Company vs. City of McAlester, in the Superior Court in and for Pittsburg County, Oklahoma, as the same appears of record and on file in my office.

Witness my hand and seal at McAlester, Oklahoma, this the 19th day of May, 1922.

H. I. Aston, Court Clerk, by J. T. Featherston, Deputy.
(Seal.)

[fol. 157] BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

[Title omitted]

FINDING OF FACTS, OPINION, AND ORDER

On September 29th, 192-, application was filed with the Corporation Commission by petition signed by the Mayor, City Attorney, CityManager and others, asking the Corporation Commission to require the Missouri, Kansas & Texas Railway Company to install an underpass under their tracks and provide highway crossing their right-of-way on what is known as Comanche Avenue in the City of McAlester. The case was docketed and set for hearing but was postponed from time to time by request of applicants and defendant. It was finally heard before Commissioner Russell in the City Hall of McAlester on May 10th, 1922, all parties interested being duly notified. J. W. Horton, City Attorney and E. M. Frye, City Manager, representing complainants; M. D. Green, Atty., and G. Z. Hopkins, Assistant Chief Operating Officer, representing the defendant, and A. I. Thompson for the Corporation Commission.

It was disclosed at the hearing that McAlester was subdivided in four wards, the railroads being the boundary; the Rock Island traversing through the city East and West and the M. K. & T. North and South, the passenger depot being located at the railroad crossing in the S. E. corner. The testimony further disclosed that [fol. 158] a large population of the city of McAlester lived both East and West of the proposed crossing and the opening prayed for under the M. K. & T. tracks on Comanche Avenue would be of great benefit to the citizens of McAlester, and especially to the citizens living in that portion South of the Rock Island and West of the M. K. & T.

A copy of the City Ordinance No. 74 was presented showing an agreement between the City of McAlester and the M. K. & T. Railway in the City of McAlester. This ordinance was passed by the City on the 8th day of November, 1901, which provided for certain crossings and how the city would acquire other crossings and provided for Comanche Avenue crossing, to-wit:

"Should any other street or alley way except Washington Avenue or Comanche Avenue, be opened across, over or under the right-of-

way, station-grounds, and tracks of the railway company, the City shall pay to the said railway company as agreed, stipulated and liquidated damages, the sum of ten thousand dollars ($10,000.00) for each and every other of said crossings, and in add-tion thereto damages equal to the actual value of any buildings or other improvements of the railway company damaged or destroyed by the opening of any street or crossing; provided that nothing herein contained shall constitute a waiver on the part of the railway company to contest the opening of any additional streets other than those herein provided for."

The railway company filed brief covering the above stipulation, contending that the Commission was without jurisdiction in reference to this application, setting forth various decisions. The Commission interprets the 1919 Session Laws to give them full jurisdiction over highway crossings where highway passes over or under, or at grade of steam or electric railroads or railways.

The evidence disclosed that the crossing asked for is essential: [fol. 159] that the Katy South from the Rock Island crossing on a high fill for a major portion of the distance in the corporate limits. The topography in the vicinity of the proposed crossing makes Comanche Avenue the most practical route to and from the business district of McAlester, especially from the South half of the city; that the present highways in the vicinity of Comanche are inadequate and hazardous and are located, to-wit: From Comanche Boulevard Delaware Avenue is located 1569½′ North. This crossing is an underpass and takes care of the drainage from Sand Creek and the sewerage from the City. The nearest crossing South of Comanche Avenue is on Ottawa Avenue. It is a grade crossing and is located 730.5′ South of Comanche Avenue. If Comanche Avenue was provided it would be of material benefit for East and West traffic and especially to residents living in the S. W. portion of the City.

The Commission afeter giving all facts due consideration and realizing the necessity of grade separation where same is practical, it is therefore ordered that the M. K. & T. Railway Company prepare a plan for reinforced concrete subway on Comanche Avenue as prayed for by applicants, the plan to provide for two openings of not less than 14′ horizontal and 12′ vertical clearance, together with an estimated cost showing quantities. The plan for underpass to show the location of drainage and industrial tracks, the track to conform to highway grade on Comanche Avenue. The above estimate and plan is to be filed with the Mayor of McAlester and the Corporation Commission on or before August 15th, 1922.

It is furthered ordered that on the failure of the M. K. & T. Railway Company and the City of McAlester to agree on the apportion of cost in the construction of the underpass on Comanche Avenue, the Commission will hear further evidence covering the division of [fols. 160 & 161] cost or change in plan, the date to be set when the applicants or defendants advise the Commission that they are unable to agree as to the division of cost.

It is further ordered that the M. K. & T. Railway Company shall have the underpass on Comanche Avenue in the City of McAlester constructed and opened for traffic within 90 days from the date the City of McAlester has arranged to pay their apportion of cost of constructing subway.

Done at Oklahoma City, Oklahoma, this 16th day of June, 1922.

Corporation Commission of Oklahoma. Campbell Russell, Chairman. Art. L. Walker, Commissioner. —— ——, Commissioner.

Attest: G. F. Smith, Secretary.

[fol. 162] BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

[Title omitted]

NOTICE OF APPEAL, REQUEST FOR TRANSCRIPT OF RECORD, AND FOR SUPERSEDEAS

To the Honorable Corporation Commission of the State of Oklahoma:

The undersigned, Missouri, Kansas & Texas Railway Company, respectfully represents and shows that heretofore, to-wit: on September 29, 1921, complaint was filed in the above entitled and numbered cause for an order for an underhead crossing under the right of way and tracks of said railway company at the point where Comanche Avenue intersects said right of way at the easterly and westerly boundary lines of said right of way in the City of McAlester, Oklahoma, and that a hearing was had therein before Chairman Russell of this Commission in the City Hall at McAlester, Oklahoma, on May 10, 1922, and on June 16, 1922, this Commission handed down its final order and decision therein bearing No. 2071, which is of record in the office of this Commission and reference to which is hereby made; that by the terms of said Final Order, your petitioner, the defendant, is directed and required to prepare plans for a proposed extension of said Comanche Avenue under its said tracks and across the said premises and that your petitioner and the City of McAlester are ordered to undertake and agree on an appor-[fol. 163] tionment of the cost thereof, and your petitioner is required to have said underhead crossing completed and opened for traffic within ninety days from the date the City has arranged to pay its portion of the cost, although the right to effect such an extension of Comanche Avenue across your petitioner's premises has never yet been secured by condemnation proceedings or otherwise, and by contract ordinance No. 74 of the City of McAlester, entered into between said City and your petitioner on November 8, 1901, provides that if said Avenue should ever be opened and established across your petitioner's premises, it should be done by an undergrade crossing under the main tracks and grade crossing over the side tracks on plans to be approved by your petitioner but at the sole cost and expense of the City.

Your petitioner is dissatisfied with said Final Order No. 2071 and feels and deems itself aggrieved by such action and order of this Commission and desires to prosecute an appeal therefrom to the Supreme Court of the State of Oklahoma and to have said order suspended pending decision of said appeal.

Wherefore, pursuant to the provisions of the Constitution of the State of Oklahoma, your petitioner, the defendant herein respectfully gives notice of its intention to appeal and requests that the Chairman of this Commission, under the seal of the Commission, shall certify to the Supreme Court of the State of Oklahoma all the facts upon which said Final Order No. 2071 was based and which may be essential for the proper decision of the appeal, together with all evidence introduced before or considered by the Commission and that the Commission file with the record of the case in the Supreme Court and as a part thereof a written statement of the reasons upon which the action appealed from was based; your petitioner further requests and prays the Commission that it be permitted to suspend or supersede said Final Order No. 2071 on such reasonable and just terms as to this Commission may [fol. 164 & 165] seem proper and that this Commission issue its order accordingly and fix the amount and terms of any suspending or supersedeas bond which may be required to be executed by your petitioner and that your petitioner be given a reasonable time within which to comply with said order of suspension and supersedeas.

Dated this 12th day of October, 1922.

Missouri, Kansas & Texas Railway Company, by M. D. Green, Its Attorney.

[fol. 166] Before the Corporation Commission of the State of Oklahoma

[Title omitted]

Order Allowing Appeal—Filed Oct. 23, 1922

On June 16, 1922, the Corporation Commission made and entered its Order No. 2071 in which the Missouri, Kansas & Texas Railway Company was ordered, directed and require- to prepare plans for a reinforced concrete subway at the intersection of Comanche Avenue and the railway company's right-of-way in the City of McAlester, Oklahoma, together with an estimated cost showing quantities, said estimate and plan to be filed with the Mayor of McAlester and the Corporation Commission on or before August 15, 1922. It was further ordered that on the failure of the Missouri, Kansas & Texas Railway Company and the City of McAlester to agree on the apportionment of cost in the construction of said underpass, that the Commission would set a date for the hearing of further evidence covering the division of cost or *nay* change in plan which

might be suggested by either the railway company or the City of McAlester.

On the 13th day of October, 1922, the Missouri, Kansas & Texas Railway Company files with the Commission its notice of appeal, request for transcript of record, and for an order superseding the effectiveness of the Commission's order No. 2071 pending an appeal to the Supreme Court of the State of Oklahoma.

Now on this the 23rd day of October, 1922, the Commission having under consideration said petition and request for transcript and supersedeas, is of the opinion and finds that an appeal should be allowed as prayed for by the railway company and that a true and correct transcript of all the proceedings had before the Commission in said cause should be prepared and filed with the Clerk [fol. 167] of the Supreme Court of the State of Oklahoma for use in the appeal to that court, but that the request for supersedeas staying the effectiveness of the requirements of said Order, should be in all things denied and overruled.

It is therefore the order of the Commission, premises considered, that the Missouri, Kansas & Texas Railway Company be and it is hereby allowed its appeal to the Supreme Court of the State of Oklahoma, and that a true and correct copy of the records and proceedings had before the Commission in said matter be prepared and filed in the Supreme Court of the State of Oklahoma for use on said appeal.

It is the further order of the Commission that the request and application for a writ of supersedeas staying the effectiveness of said Order No. 2071 be and the same is hereby in all things overruled and denied.

Done at Oklahoma City this the 23rd day of October, 1922.

Corporation Commission of Oklahoma. —— ——, Chairman. Art L. Walker, Commissioner. E. R. Hughes, Commissioner.

Attest: G. F. Smith, Sec'y.

[fol. 186] CHAIRMAN'S CERTIFICATE

UNITED STATES OF AMERICA,
State of Oklahoma, ss:

I, Campbell Russell, Chairman of the Corporation Commission, do hereby certify that the above and foregoing is a full, true and complete transcript of the record made before the Corporation Commission in Cause No. 4410, in which Order No. 2071 was promulgated: and I further certify that the said record contains all of the pleadings, evidence taken and introduced, offered or considered by the Commission, and objections thereto, all motions, exceptions, rulings and orders of the Commission, made in said cause, and all of the facts upon which said Order No. 2071 was based, together with a written statement of the reasons upon which said

order was based; and that the same is a full, true, correct and complete transcript of the record in said cause.

Given under my hand and the seal of the Corporation Commission of the State of Oklahoma, this the 14th day of November, 1922.

Campbell Russell, Chairman.

Attest: G. F. Smith, Secretary. (Seal Corporation Commission of Oklahoma.)

[fol. 169] IN SUPREME COURT OF OKLAHOMA

[Title omitted]

ARGUMENT AND SUBMISSION—Filed June 12, 1923

And now on this day the above cause is argued orally and submitted on the record, briefs and oral argument.

[fol. 170] IN SUPREME COURT OF OKLAHOMA

[Title omitted]

JUDGMENT—Dec. 11, 1923

And now this cause comes on for final decision and determination by the court upon the record and briefs filed therein.

And the court having considered the same finds that the order of the Corporation Commission in the above cause should be affirmed.

It is therefore ordered and adjudged by the court that the order of the Corporation Commission in the above cause, be, and the same is hereby affirmed.

Opinion by Harrison, J.

Johnson, C. J., Kennamer, Branson, and Cochran, JJ., concur.

[fol. 171] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

OPINION—Filed Dec. 11, 1923

Syllabus

1. The various sections of article 9 of the Constitution create the Corporation Commission, confer and define certain duties and powers and vest it with certain specific jurisdiction, and section 19 Id. after conferring certain jurisdiction upon the Corporation Commission to control corporations within the

state, provides: "The Commission may be vested with such additional powers and charged with such duties * * * as may be prescribed by law."

2. Pursuant to the power conferred upon it by the above constitutional provision, the Legislature by Chapter 15, C. L. 1921, vested the Corporation Commission with additional jurisdiction and powers and charged it with additional duties, among [fol. 172] which are as follows: "The Corporation Commission is given full jurisdiction over all public highway crossings where same cross steam or electric railroads or railways within the State of Oklahoma."

3. Under the foregoing section, in connection with other sections of chapter 15, C. L. 1921, the Corporation Commission has full jurisdiction over all public highways crossings and has authority to order such crossings to be constructed, as it may be petitioned by proper authorities to do, and authority to make an estimate of the cost of construction of such crossings and to assess the cost of same against the petitioners and the railroad company, according to its sound discretion and judgment, and to enforce, as provided by law, its orders for the construction of same.

4. Article 2, section 24 of the Constitution provides specifically: "Private property shall not be taken or damaged for public use without just compensation." Hence where a railroad company owns the fee in its right of way, such right of way cannot be appropriated or damaged for public use without compensation, either by amicable settlement or by proper condemnation proceedings.

5. Where a city has selected the point for the construction of a grade crossing over a railroad, and upon a petition of the Corporation Commission has ordered the railroad company to construct such grade crossing, it cannot enforce obedience to such order until after the question of damage to the fee in its right of way has been determined, either by amicable settlement or by proper condemnation proceedings. In such case it is im- [fol. 173] material whether the estimate of *of* cost of construction of such crossing be made first, or whether the estimate of damage to the right of way be made first, but it is necessary that the point of crossing should be made before either could be accurately made. Provided, however, that the order of the Corporation Commission for the construction of such crossing cannot be enforced in any event, until the damage to the right of way has been determined by amicable settlement or by proper condemnation proceedings.

Appeal from Order of the Corporation Commission

Affirmed

M. D. Green, H. L. Smith, for appellant.
E. S. Ratliff, Horton & Gill, for appellees.

[fol. 174] HARRISON, J.:

This action involves the jurisdiction of the Corporation Commission to order crossings over or under transportation lines where there is a public demand for same. The action in question arose out of a demand by the City of McAlester for a crossing under Comanche Avenue in said city, to be constructed, in part at least, by the plaintiff in error, M., K. & T. Ry. Co.

The facts necessary to reveal the material circumstances in the case may be observed from a resolution passed by the Council of said City, Sept. 19, 1921, and final hearing had thereon May 10, 1922, together with the Finding of Facts, Opinion and Order of the Corporation Commission which are as follows:

"Whereas, Comanche Avenue is one of the public highways and streets of the Incorporated City of McAlester, Oklahoma, and one of the main thoroughfares and highways connecting and between the Second and Third Wards of said City, each of said wards containing a large population, and having located in each of them public schools of the City, the public school of the Third Ward being located on said Comanche Avenue, and the said Commanche Avenue running through the central portions of said Second and Third Wards; and, whereas, there exists at the intersection of said Commanche Avenue and the roadbed, tracks and right of way of the Missouri, Kansas & Texas Railway Company, a steam railway company, a very high embankment which completely obstructs passageway along said Commanche Avenue between the said Second and Third Wards and many other portions of said City, thereby greatly impeding the travel in said City and access of citizens to and from different points therein [fol. 175] and communication with each other, and retarding the improvement and development of said City; and, whereas, by reason of the premises a public necessity exists for a crossing upon, over or under the said track, roadbed and right of way of said Missouri, Kansas & Texas Railway Company where said Comanche Avenue intersects therewith.

Now, therefore, be it resolved by the Mayor and City Council of the City of McAlester, Oklahoma, that the said City of McAlester make application to the Corporation Commission of the State of Oklahoma for an order requiring said Missouri, Kansas & Texas Railway Company and Chas. E. Schaff, its Receiver operating its properties, to construct and maintain a public highway crossing at the intersection of Commanche Avenue with the tracks of said railway Comapny as aforesaid; and that the City Manager and the City Attorney of said City are hereby directed, authorized and empowered to, for and in the name of said city to make said application to said Corporation Commission and to do all acts and things necessary and proper in and about the presentation and prosecution of said application.

Passed and approved this 19th day of September 1921.

Hearing was had in the City Hall of the City of McAlester on May 10, 1922."

"Findings of Facts, Opinion, and Order

On September 29th, 1921, application was filed with the Corporation Commission by petition signed by the Mayor, City Attorney, City Manager and others, asking the Corporation Commission to require the *the* Missouri, Kansas & Texas Railway Company to install an underpass under their tracks and provide highway crossing their [fol. 176] right of way on what is known as Commanche Avenue in the City of McAlester. The case was docketed and set for hearing but was postponed from time to time by request of applicants and defendant. It was finally heard before Commissioner Russell in the City Hall of McAlester on May 10th, 1922, all parties interested being duly notified. J. W. Horton, City Attorney, and E. M. Frye, City Manager, representing complainants; M. D. Green, Atty. and Z. G. Hopkins, Assistant Chief Operating Officer, representing the defendants, and A. I. Thompson, for the Corporation Commission.

It was disclosed at the hearing that McAlester was subdivided in four Wards, the Railroads being the boundary; the Rock Island traversing through the City east and west and the M. K. & T. North and south, the passenger depot being located at the railroad crossing in the S. E. corner. The testimony further disclosed that a large population of the City of McAlester lived both east and west of the proposed crossing and the opening prayed for under the M. K. & T. tracks on Commanche Avenue would be of great benefit to the citizens of McAlester, and especially to the citizens living in that portion south of the Rock Island west of the M. K. & T.

A copy of the City Ordinance No. 74 was presented showing an agreement between the City of McAlester and M. K. & T. Railway in the City of McAlester. This ordinance was passed by the City on the 8th day of November, 1901, which provided for certain crossings and how the City could acquire other crossings, and provided for Commanche Avenue crossing, to wit:

"Should any other street or alley way except Washington or Commanche Avenue, be opened across, over or under the right of way, station grounds, and tracks of the Railway Company, the City [fol. 177] shall pay to the said Railway Company as agreed, stipulated and liquidated damages, the sum of Ten Thousand dollars $10,000.00 for each and every other of said crossings, and in addition thereto damages equal to the actual value of any buildings or other improvements of the Railway Company damaged or destroyed by the opening of any street or crossing; provided that nothing herein contained shall constitute a waiver on the part of the Railway Company to contest the opening of any addit-onal streets other than those herein provided for."

The Railway Company filed brief covering the above stipulation, contending that the Commission was without jurisdiction in reference to this application, setting forth various decisions. The Commission interprets the 1919 Session Laws to give them full jurisdic-

tion over highway crossings where highway passes over or under, or at grade of steam or electric railroads or railways.

The evidence disclosed that the crossing asked for is essential; that the Katy south from the Rock Island crossing on a high fill for a major portion of the distance in the corporate limits. The topography in the vicinity of the proposed crossing makes Commanche Avenue the most practicable route to and from the business district of McAlester, especially from the south-half of the City; that the present highways in the vicinity of Commanche are inadequate and hazardous and are located, to wit; From Commanche Boulevard, Delaware Avenue is located 1,569½′ north. This crossing is an underpass and takes care of the drainage from Sand Creek and the sewerage from the City. The nearest crossing south of Commanche Avenue is on Ottowa Avenue. It is a grade crossing and is located 730.5′ south of Comanche Avenue. If Comanche Avenue was provided it would be of material benefit for east and west traffic and especially to residents living in the S. W. portion of the City.

The Commission after giving all facts due consideration realizing [fol. 178] the necessity of grade separation where the same is practical, it is therefore ordered that the M., K. & T. Railway Company prepare a plan for reinforced concrete subway on Comanche Avenue as prayed for by applicants, the plan to provide for two openings of not less than 14′ horizontal and 12′ vertical cle-rance, together with an estimated cost showing quantities. The plan for underpass to show the location of drainage and industrial tracks, the track to conform to highway grade on Commanche Avenue. The above estimate and plan is to be filed with the Mayor of McAlester and the Corporation Commission on or before August 15, 1922.

It is further ordered that on the failure of the M., K. & T. Railway Company and the City of McAlester to agree on the apportion of cost in the construction of underpass on Commanche Avenue, the Commission will hear further evidence covering the division of the cost or change in plan, the date to be set when the applicants or defendants advise the Commission that they are unable to agree as to the division of cost.

It is further ordered that the M., K. & T. Railway Company shall have the underpass on Comanche Avenue in the City of McAlester constructed and opened for traffic within 90 days from the date the City of McAlester has arranged to pay their apportion of cost of constructing the subway.

Done at Oklahoma City, Oklahoma, this 16th day of June, 1922."

Plaintiff in error complains of this order upon two material grounds:

First. Lack of jurisdiction.

Second. Lack of sufficient facts to warrant the exercise of jurisdiction, if by law it has jurisdiction.

The authority under which the Corporation Commission acted in this particular, was conferred by an act of the Legislature, 1919, pursuant to authority vested in it by section 19, article 9 of the Constitution.

The various sections of article 9 of the Constitution create the Corporation Commission, define certain specific duties and powers, and section 19 Id. after conferring certain jurisdictions upon the [fol. 179] Corporation Commission to control corporations within the State provides:

"The Commission may be vested with such additional powers and charged with such other duties * * * as may be prescribed by law."

The above provision constitutes a special grant of authority to the Legislature to confer additional jurisdiction, powers and duties upon the Corporation Commission that are specifically conferred by the Constitution, and pursuant to authority this conferred upon it, the Legislature by Act of S. L. 1919, page 88, vested the Corporation Commission with the additional jurisdiction, powers and duties provided for in said act, the section of said act which controls in the present case, (the same being section 3491 C. L. 1921) is as follows:

"The corpo-ation commission is given full jurisdiction over all public highway crossings, where same cross steam or electric railroads or railways within the State of Oklahoma."

This section was construed by this court in M. K. & T. Ry. Co. v. State et al., — Okla., —, 200 Pac. 208, and there given literal interpretation of the wording of the statute. In as much as the first section of the act, the same being section 3491, supra, which says:

"The Corporation Commission is given full jurisdiction over all public highway crossings."

could not mean anything else than that no other administrative board or body has jurisdiction over such matters, the fact that section 2 of the act authorizes the Corporation Commission in overgrade or undergrade public highway crossings to make an assignment of the cost of maintenance of the same and the fact that in the express words the assignment of the maintenance and costs of such crossings shall be left to the discretion of the corporation commission, supports and carries out the original idea suggested and provided for in the first [fol. 180] section, the only limitation placed upon the corporation commission being that no more than 50 per cent of the cost of maintenance shall be assessed against the municipality and the further fact that under section 3, hearings had in such matters shall be under the same rules and procedure, etc., as in other matters and the same right of appeal given to the Supreme Court as in other cases, emphasize the intention of the Legislature to confer jurisdiction in such matters upon the Corporation Commission alone.

To acquire jurisdiction in such matter the Corporation Commission is of course confined to its ordinary rules and common reason, if it be an individual's rights affected, perhaps the petition of the individual would be sufficient, if it be a minicipality, jurisdiction could be acquired by the ordinary rules as to administrative board authorized to represent municipalities in such matters, in the case at bar, it is a city council, through its city attorney.

We hold, therefore, that there was no question as to the corporation commission having properly acquired jurisdiction and no question under the statute but that it had authority to exercise jurisdiction.

This view of the question of jurisdiction is supported by M. K. & T. Ry. Co. v. State, — Okla. —, 200 Pac. 208, also by C. R. I. & P. Ry. Co. v. Taylor, 79 Okla. 142, 192 Pac. 349, and supported as to the comparatively every phase involved, in an exhaustive opinion by Mr. Justice Holmes in 65 L. Ed. 322. Mr. Justice Holmes in the body of the opinion after deciding that the right of states to regulate railroad crossings is a proper exercise of police power, has the following to say in regard to the establishment and maintenance of grade crossings:

"Grade crossings call for a necessary adjustment of two conflicting interests—that of the public using the streets, and that of the railroads and the public using them. Generically the streets represent the more important interest of the two. There can be no doubt that they did when these railroads were laid out, or that the advent of [fol. 181] automobiles has given them an additional claim to consideration. They always are the necessity of the whole public, which the railroads, vital as they are, hardly can be called to the same extent. Being places to which the public is invited, and that it necessarily frequents, the state, in the care of which this interest is, and from which, ultimately, the railroads derive their right to occupy the land, has a constitutional right to insist that they shall not be made dangerous to the public, whatever may be the cost to the parties introducing the danger. That is one of the most obvious cases of the police power; or, to put the same proposition in another form, the authority of the railroads to project their moving masses across thoroughfares must be taken to be subject to the implied limitation that it may be cut down whenever and so far as the safety of the public requires. It is said that if the same requirement were made for the other grade crossings of the road it would soon be bankrupt. That the states might be so foolish as to kill a goose that lays golden eggs for them has not bearing on their constitutional rights. If it reasonably can be said that safety requires the change, it is for them to say whether they will insist upon it, and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil. Denver & R. G. R. Co. 250 U. S. 241, 246, 63 L. Ed. 958, 962, 39 Sup. Ct. Rep. 450. To engage in interstate commerce the railroad must get on to the land; and, to get on to it, must comply with the conditions imposed by the state for the safety of its citizens. Contracts made by the road are sub-

ject to the possible exercise of the sovereign right. Denver & R. G. Co. v. Denver, 250 U. S. 241, 244, 63 L. Ed. 958, 961, 39 Sup. Ct. Rep. 450; Union Dry Goods Co. v. Georgia Public Service Corp. 248 [fol. 182] U. S. 372, 63 L. Ed. 309, 9 A. L. R. 1420, P. U. R. 1919 C, 60, 39 Sup. Ct. Rep. 117, Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671, 31 Sup. Ct. Rep. 265; Northern P. R. Co v. Minnesota, 208 U. S. 583, 52 L. Ed. 630, 28 Sup. Ct. Rep. 341; Manigault v. Springs, 199 U. S. 473, 480, 50 L. Ed. 274, 278, 26 Sup. Ct. Rep. 127. If the burdens imposed are so great that the road cannot be run at a profit, it can stop, whatever the misfor*u*nes the stopping may produce. Brooks-Scanlon Co. v. Railroad Commission, 251 U. S. 396, 64 L. Ed. 323, P. U. R. 1920 C. 579, 40 Sup. Ct. Rep. 183.

"Intelligent self interest should lead to a careful consideration of what the road is able to do without ruin, but this is not a constitutional duty. In the opinion of the courts below the evidence justified the conclusion of the board that the expense would not be ruinous. Many details as to the particular situation of this road are disposed of without the need of further mention by what we have said thus far."

This case like the case of C. R. I. & P. v. Taylor, supra, clearly shows that the regulation of street railway crossings and maintenance in such form as to be safe to the public, is the proper exercise of the police power of the state, and the Erie R. R. Co. v. Board of Public Utilities, supra, the Southern Ry. Co. v. Oklahoma City, 12 Okla. 82, 69 Pac. 1050, clearly support the theory that if the state has power, in the absence of contract as to same it has power to force a railroad to construct such crossings at its own expense and without compensation for the use of their right of way. But in the case at bar it is conceded that there was no contract between the federal government and the M. K. & T. Ry. Co. in its charter, that the M. K. & T. Ry. should grant this crossing without compensation for the damage done to its right of way. Section 24, Article 2 of the State Constitution provides specifically:

"Private property shall not be taken or damaged for public use [fol. 183] without just compensation."

The section then goes on to prescribe the manner in which damage to same may be ascertained and compensation awarded. The section is self executing in its provisions, therefore the Legislature has provided no means in conflict therewith nor has it the authority to do so. Under this provision of the Constitution the right of the state or a municipality thereof to appropriate public property to a public use can not be exercised until reasonable compensation for damage to the fee is awarded. But the contention that compensation for damage to the fee should have been awarded upon the selection of the point of crossing and the estimate of cost of building such crossing at such point is wholly without merit.

As we view the matter, it is immaterial whether the estimate of damage to the fee or the estimate of cost of constructing the crossing should be made first, in other words, it is immaterial so far as the law is concerned as to which estimate is made first, but it stands to reason that neither estimate could be made until the point for the crossing be first selected; after such point for the crossing is selected, the fact that the Corporation Commission made the estimate of the cost of construction of the crossing before the awared was made as to the damage to the fee, does not effect the jurisdiction of the Corporation Commission nor the validity of the estimate it made. The fact is that the proper authorities for the City selected the point of crossing and the Corporation Commission upon the evidence submitted, made an estimate of the cost of construction thereof and assessed the cost of same to the parties interested, viz: the City of McAlester and the Railroad company. The statutes, however, prohibit the Corporation Commission from assessing more than 50 per cent of the cost of construction to the City, and as it assessed only 50 per cent of such cost to the city its order should be and is sustained.

We hold, however, that in this case, it appearing that the Railroad [fols. 184 & 185] Company owns the fee in the right of way and that its charter contains no provision that it shall part with such fee without compensation, the order of the Corporation Commission for the Railroad Company to construct such under grade crossing cannot be enforced until after an amicable settlement between the City of McAlester and the Railroad Company, or until after an award for damages to the fee is determined by proper condemnation proceedings instituted by the City in the courts as provided by statute, and that when such is done and the damages to the fee determined by the court, then the order of the Corporation Commission for the construction of such crossing may be enforced as the law provides.

Johnson, C. J., Kennamer, Branson and Cochran, JJ. concur.

[fol. 185-1] IN SUPREME COURT OF OKLAHOMA

[Title omitted]

PETITION FOR REHEARING—Filed Dec. 20, 1923

Comes now the appellant and for its application and petition for a rehearing herein respectfully shows to the court that in the opinion of this court filed in this cause on December 11, 1923, questions decisive of this case and duly submitted by counsel for appellant have been overlooked by the court, and the decision is in conflict with controlling decisions, to which the attention of this court was called both in brief and in oral argument, and which have been overlooked by this court, as hereinafter more particularly set out.

[fol. 185-2] This court states in its opinion that appellant complains of the Corporation Commission's order on two material grounds:

First. Lack of jurisdiction.

Second. Lack of sufficient facts to warrant the exercise of jurisdiction, if by law it had jurisdiction."

The court has completely overlooked an additional material ground of complaint covered in appellant's brief under sub-head No. 2, pages 66 to 86, which sub-head is as follows:

"II

"Validity and effect of contract ordinance No. 74 and constitutional questions involved. (Specifications of Error 3, 4, 5 and 6.)"

The Corporation Commission, by its order herein, which this court has affirmed by its opinion herein, directs the appellant to construct an undergrade highway crossing at the point in question, and to undertake to agree with the appellee on a division of the cost of such crossing.

One of the most important reasons alleged by appellant why the Corporation Commission could not legally require it to share the burden of the expense of such crossing was the existence of a contract between appellant and appellee covered by Ordinance No. 74, passed and approved November 8, 1901, by the terms of section 9 of which the appellee agreed that if a highway crossing should ever be established at the point in question, it should be undergrade and should [fol. 185-3] be at the sole cost and expense of the appellee. This ordinance was introduced in evidence at the hearing before the Corporation Commission and is printed in its entirety at pages 18 to 25, of appellant's brief in this court, section 9 thereof covering the matter now before the court, being on page 24 of that brief.

The Corporation Commission by its order herein, which is affirmed in its entirety by this court, mentions the fact that this ordinance was introduced and quotes from a part of it, but not from section 9, but from section 5, which quoted part of section 5, does not apply to the controversy now before this court, and the Commission then said in its order that under the 1919 law, it was given full jurisdiction over highway crossings, and attempted to dispose of appellant's contention by that brief reference.

In appellant's specifications of error, at pages 33 and 34 of its brief herein, the questions arising out of this contract between the parties are presented as follows:

"3. The Corporation Commission of Oklahoma had no jurisdiction to impose upon appellant any requirements or conditions other than, or different from, those agreed to in contract Ordinance No. 74 of the City of McAlester, passed and approved on November 8, 1901.

"4. The Corporation Commission of Oklahoma erred in ignoring and treating as null and void and of no effect, the said contract between the City of McAlester and appellant as represented by said Ordinance No. 74.

[fol. 185-4] "5. The order of the Corporation Commission results in a taking of appellant's property without due process of law and without compensation and denies it the equal protection of the law in violation of the fifth and fourteenth (5th and 14th) amendments to the Constitution of the United States, and of sections seven and twenty-four, article two, of the Constitution of the State of Oklahoma.

"6. The order of the Corporation Commission denies to appellant the right of contract and impairs the obligation of contracts in violation of section ten of article one of the Constitution of the State of Oklahoma."

This question is presented as fully as counsel were able to brief it under the sub-head No. 2, at pages 66 to 86, of its brief, and section 9 of the contract Ordinance No. 74, is again quoted at page 68 of that brief, the provision thereof under which the city agreed to bear the entire cost of any future crossings at the point in question being as follows:

"* * * and both of said crossings at Comanche Avenue and Washington Avenue, shall be constructed upon plans and specifications to be approved by the said railway company and at the sole cost and expense of the said City of South McAlester."

As shown in appellant's brief at pages 66 to 86, this contract Ordinance No. 74 had been in effect for a great many years and had been conscientiously lived up to in all particulars by both parties until the institution of this proceeding, and at the time it was made the city [fol. 185-5] had authority under the laws of Arkansas, then in force in Indian Territory, to make such a contract. These laws are set out in full at pages 69 to 71 of appellant's brief. The following citations were also given as authority for the validity of the contract ordinance:

28 Cyc. 634-6;
Dillon's Municipal Corporations, 4th ed., Vol. 1, page 512;
Elliott on Contracts, Vol. 1, Sec. 601.

Appellant then cited and quoted at pages 72 to 86 of its brief from a great many cases upholding contracts more or less similar in their nature, all of which have been overlooked by this court and a list of which appellant begs leave to submit as follows:

City of Argentine v. Atchison, T. & S. F. Ry. Co. (Kans. 1895), 41 Pac. 946;
Hicks v. Chesapeake & O. R. R. Co. (Ct. of A. Va. 1903), 45 S. E. 888;
State, ex rel. City of Carthage v. Cowgill & Hill Mill Company, 55 S. W. 1008;
Elliott on Contracts, Vol. 1, Sec. 615;
First National Bank of Red Oak v. City of Emmetsburg (Ia. 1912), 138 N. W. 451;
Atlas Life Insurance Co. v. Board of Education of the City of Tulsa (not officially reported), 200 Pac. 171;

Hitchcock, et al., v. City of Galveston, 96 U. S. 341, 24 Law ed. 659;
Washington Water Power Co. v. City of Spokane (Wash. 1916), 154 Pac. 329;
Crump v. Guyer, et al., 60 Okl. 222, 157 Pac. 321;
[fol. 185-6] Enid City Railway Company v. City of Enid, 43 Okl. 778, 144 Pac. 617;
Elliott on Contracts, Vol. 3, Secs. 2725, 2729 and 2763.

If this contract Ordinance No. 74 is a valid and binding contract, and appellant contends that it is, then any highway crossing established at the point in question must be constructed at the sole cost and expense of the city, and the action of the Corporation Commission as affirmed by this court, in requiring appellant to participate in the cost of construction of such highway crossing, is in violation of the plain terms and provisions of the contract and in violation of the contract rights and other constitutional rights of appellant under both the state and Federal Constitutions, as set out in its specifications of error above quoted, and appellants would be entitled to have any adverse decision of this court reviewed by the Supreme Court of the United States.

The evidence of Mr. Z. G. Hopkins (Rec., pp. 92-112, brief pp. 27-28), shows that the total cost of an underhead crossing such as is contemplated by the Corporation Commission's Order, would be from $18,000.00 to $28,000.00, from which it will be seen that to require appellant to share in that cost to the extent of fifty per cent, or more, when its contract with the appellee relieves it from any part of such cost, is a very substantial pecuniary damage to appellant's rights and interests.

[fols. 185-7] In appellant's reply brief there is a further discussion of the validity of this contract Ordinance No. 74, under sub-head 2, at pages 12 to 21 thereof, with the followig citations of authority:

Elliott on Contracts, Vol. 1, Secs. 603 and 615;
Elliott on Contracts, Vol. 2, Secs. 1514, 1515 and 1519;
Western Union Tel. Co. v. Pennsylvania Co. (C. C. A. 3rd Cir.), 129 Fed. 849;
Great Northern Ry. Co. v. Manchester, etc., Ry. Co., 5 De Gex & Samale's Chancery Reports, 138.

It is respectfully requested that the court will carefully read these portions of appellant's first brief and reply brief and review the authorities therein cited in support of the validity of this contract Ordinance No. 74, and decide the question raised thereunder.

There are other matters of lesser importance in this court's opinion which seem to appellant to be contrary to law and to which attention is respectfully called as follows:

This court, in discussing the 1919 law, giving jurisdiction to the Corporation Commission in these highway crossing matters, very properly, as counsel thinks, holds that the point of crossing must be selected before there can be either an estimate of cost of construction or a condemnation to acquire the right to cross, but this court then says:

[fol. 185-8] "The fact is, that the proper authorities for the city selected the point of crossing and the Corporation Commission, upon the evidence submitted, made an estimate of the cost of construction thereof and assessed the cost of same to the parties interested * * *"

In so deciding that the apellee city was the party to select the point of crossing, this court does violence to section 4 of the 1919 act. This court, in its opinion, reviews and construes sections 1, 2 and 3, of that act, but overlooks entirely section 4, which is section 3494 of the 1921 Compiled Laws, and which gives the Corporation Commission the exclusive jurisdiction to fix the point of crossing, or, in other words, the location of the highway crossing over the railroad. This section in full reads as follows:

"The Corporation Commission shall have exclusive jurisdiction to determine and prescribe the particular location of highway crossings, for steam or electric railways, the protection required, to order the removal of all obstructions as to view of such crossings, to alter or abolish any such crossings, and to require, where practicable, a separation of grade at any such crossing, heretofore or hereafter established."

This court's opinion is, therefore, in conflict with the statute and for the purpose of this case and future cases, it is respectfully urged that the statute in its entirety, covered by sections 3491 to 3495, both [fol. 185-9] inclusive, 1921 Compiled Laws, should be fully and properly construed in accordance with its plain language and intent. On reflection, it is apparent that if the power to locate the crossing is in some instances to be given to the local authorities rather than to the Corporation Commission, as contemplated by this statute, then, to a very large and material extent, the Corporation Commission loses the power sought to be given it by the statute for the safety and protection of travellers on highways and on railroads by requiring crossings to be constructed at comparatively safe places and in a safe manner.

It would seem to counsel that, as stated in their brief at pages 62 to 65, and the authorities there cited, that the procedure of this 1919 law should be practically the same as that outlined by this court, for the crossing by one railroad of another under authority of the Corporation Commission and under sections 18 and 27, article 9, of the Oklahoma Constitution. This court has held in Atchison T. & S. F. R. Co. v. Corporation Commission, 22 Okl. 106, 98 Pac. 330, and Missouri K. & T. R. Co. v. Richardson, Judge, 25 Okl. 640, 106 Pac. 1108, that the Corporation Commission must first determine the necessity for, the place where and the manner in which one railroad may cross another, after which the right to cross may be acquired by condemnation proceedings.

This 1919 law undertakes to give the Corporation Commission jurisdiction to determine the necessity for, the place where and the [fols. 185-10 & 186] manner in which a highway shall cross a rail-

road and to say that the local authorities may determine the necessity for and fix the place of such crossing is contrary to this statute.

Wherefore, for the reasons hereinabove set out, appellant respectfully prays the court for a re-hearing herein and that on re-hearing, the contract Ordinance No. 74, be upheld in its entirety, and that the 1919 law be fully and correctly construed, and that the cause be reversed.

Respectfully submitted, M. D. Green, H. L. Smith, Attorneys for Appellant.

Dated December 19, 1923.

[fol. 186-1] IN SUPREME COURT OF OKLAHOMA

[Title omitted]

RESPONSE TO APPELLANT'S PETITION FOR REHEARING—Filed July 23, 1924

Come now the appellees herein and file response to the application and petition of the appellant for a rehearing herein, the court having requested that such response be filed.

The appellant in its petition for rehearing seems to complain upon two grounds, as follows, taking up the last ground first:

The appellant complains (pp. 8-10) that the decision of the court herein holds that "the appellee city was the party to select the point of crossing."

It is perfectly apparent that the court has not so decided. On the contrary, the court expressly construes the Act of 1919 (Ch. 53, p. 88, Sess. L. 1919; Comp. Stat. Okl. Secs. 3491-3497), to confer [fol. 186-2] exclusive jurisdiction upon the Corporation Commission, both in the selection of the crossing and in all matters relating to the construction of the crossing, the court expressly saying that the language of the Act "could not mean anything else than that no other administrative board or body has jurisdiction over such matters." The opinion further proceeds to say:

"To acquire jurisdiction in such matters the Corporation Commission is of course confined to its ordinary rules and common reason. If it be an idividual's rights affected, perhaps the petition of the individual would be sufficient; if it be a municipality, jurisdiction could be acquired by the ordinary rules as to administrative boards authorized to represent municipalities in such matters. In the case at bar it is the city council through its city attorney."

That is to say, that while the Corporation Commission has the exclusive jurisdiction over such matters, this jurisdiction is called into exercise only in the ordinary way in which such jurisdiction is invoked; that is, upon the application or petition of the interested

party. In the instant case, the city council of McAlester having decided that there should be better means of public communication and travel through different parts of the city by an undergrade crossing over the right of way of the Missouri, Kansas & Texas Railway Company at Comanche Avenue, selected, by proper resolution of the city council, such point as a railway crossing and instructed its city manager and city attorney to present its application to the [fol. 186-3] Corporation Commission for an order requiring the railway company to construct such crossing at Comanche Avenue. The record shows that such application was presented and that testimony was introduced upon the issue as to whether a public necessity existed for a railway crossing at Comanche Avenue, and the record further shows that the Corporation Commission, upon consideration of the evidence, found there was such a public necessity, and that it selected Comanche Avenue as a proper place for a railway crossing, having jurisdiction, and the sole jurisdiction, to make such selection and to order the constructing of the crossing. The fact that it had the exclusive jurisdiction to order the construction of the crossing at that particular point itself necessarily involves the power to select the place of crossing, and besides, the Act (Sec. 4) specifically says that, "The Corporation Commission shall have exclusive jurisdiction to determine and prescribe the particular location of highway crossings." The city, of course, in the first instance, petitions for the crossing at the particular point where the same is desired, but the Commission alone determines or selects the location of the crossing, and it is perfectly manifest that in this sense alone was the language used by the court and complained of by appellant, "that the proper authorities of the city selected the point of crossing," and we almost feel like apologizing to the court for dwelling at such length upon a proposition so obvious from the court's decision.

[fol. 186-4] II

Appellant further complains (p. 2) that the court has overlooked its contention with reference to the validity and effect of Section 9 of Ordinance No. 74 of the City of South McAlester, passed November 8, 1901.

In answer to this contention of appellant, it would be sufficient to say that the validity and effect of this ordinance was fully discussed and argued in the briefs filed by the parties (see Original Brief of Appellant, pp. 66-86; Brief of Appellees, pp. 41-86, and Reply Brief of the Appellant, pp. 12-21), the discussion of this point occupying a very prominent and conspicuous place in the briefs, with copious quotations from many authorities upon the question. It could scarcely be said, therefore, that the point has escaped the attention and consideration of the court. The effect of the decision necessarily overrules the contention of the appellant, for if section 9 of Ordinance No. 74 is a valid and subsisting contract between the railway company and the city of McAlester, then it is conclusive

road and to say that the local authorities may determine the necessity for and fix the place of such crossing is contrary to this statute.

Wherefore, for the reasons hereinabove set out, appellant respectfully prays the court for a re-hearing herein and that on re-hearing, the contract Ordinance No. 74, be upheld in its entirety, and that the 1919 law be fully and correctly construed, and that the cause be reversed.

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against the right of the city to extend Comanche Avenue across appellant's right of way by condemnation proceedings, except on the terms stipulated and conclusive against the power and jurisdiction of the Corporation Commission to assess any portion of the cost of the crossing against the appellant, both of which are conclusively settled by the decision. It is not necessary that the court in its decision should take up and discuss in detail each proposition argued in the briefs and the court is under no obligation to do so.

[fol. 186-5] That this question received the deliberate consideration of the court is clearly evident not only from the necessary effect of the decision, but from its express language. The court bases the jurisdiction and power of the Corporation Commission to order the construction of the crossing specifically upon the police power of the state. In support of this it cites, among others, the case of Chicago, Rock Island & Pacific Railway Co. v. Taylor, 79 Okl. 142, 192 Pac. 349, which case the appellees in their brief (pp. 72-77) in their argument answering the contention of the appellant as to the controlling effect of the city ordinance, cited, after quoting from a great number of other authorities, as a controlling decision and as foreclosing the question in this court. The opinion in the instant case, after citing the Taylor case in support of its conclusion, says that its decision is "supported as to comparatively every phase involved" in an exhaustive opinion by Mr. Justice Holmes in Erie Railroad Co. v. Board of Public Utility Commissioners, 254 U. S. 394, 65 L. Ed. 322, and follows with a quotation from the latter case which decisively answers every contention made by appellant as to the validity and effect of the old city ordinance, and adds:

"This case, like the case of C. R. I. & P. v. Taylor, supra, clearly shows the regulation of street railway crossings and maintenance in such form as to be safe to the public is the proper exercise of the police power of the state * * *."

From the case of C. R. I. & P. v. Taylor, the appellees quoted in their brief (p. 75):

[fol. 186-6] "* * * It is firmly settled by the courts in a long line of decisions that the Legislature in the exercise of its police power may onerate railroad companies with the duty of maintaining crossings, although the street or highway was laid out subsequent to the construction of the railroad (citing a vast number of cases). * * * In the exercise of its police powers, the state may require railroad corporations at their own expense, not only to abolish grade crossings, but to build and maintain suitable bridges and viaducts to carry the street or highway across the railroad tracks (citing many cases)."

In the case of Erie Railroad Co. v. Board of Public Utility Commissioners, supra, the Erie Railroad had been ordered by the Board of Public Utility Commissioners of New Jersey by an order dated April 20, 1915, to construct or make changes in fifteen places in the city of Paterson, where the railroad crossed that number of streets. The Board of Public Utility Commissioners of New Jersey derived

their authority to order the crossings under an Act of March 12, 1913. The case seems to have been one of great importance, involving an expenditure by the railroad company of over $2,000,000. There was an imposing array of counsel, including Mr. Charles E. Hughes, in the case, and the briefs show the utmost diligence and power in keeping with the skill and experience of the distinguished corps of counsel. Among other things, it was contended that as the crossings involved an expenditure of over $2,000,000, and that the company had not more than $100,000 available, "that the order of the board and the statute when construed to justify it, not only in- [fol. 186-7] terfered unwarrantably with interstate commerce and impaired the obligation of contracts but took the Erie Company's property without due process of law." In other words, that the order and statute were confiscatory, a destructive interference with interstate commerce and impaired the obligation of the Erie Company's contract (arising presumably from its charter and franchise).

These arguments, of course, possessed both the logic of reason and the persuasion of expediency, and presented a most powerful appeal. They were presented by great counsel and to the greatest court on earth, but above them all, the court heard only the more powerful and all-controlling voice of the police power of the state so forcibly demonstrated in the quotation above by this court in its opinion; that voice which is thus defined in Yazoo & M. V. R. Co. v. Harrington, 37 So. 1016, 1018, 85 Miss. 366, 3 Ann. Cas. 181:

" 'Police power' includes the public convenience, as well as the public safety, health, and morals. That power is to organized government what the atmosphere is to man; 'its vital breath, its native air.' It penetrates, permeates, pervades all, in its omnifically healing reach, 'broad and general as the casing air.' It is the oil in which the machinery of government efficiently moves."

We call attention to the following additional language of the United States Supreme Court in the Erie Railroad case supra:

"Most of the streets concerned were laid out later than the rail- [fol .186-8] roads, and this fact is relied upon, so far as it goes, as an additional reason for denying the power of the state to throw the burden of this improvement upon the railroad. That is the fundamental question in the case. It might seem to be answered by the summary of the decisions given in Chicago, M. & St. P. R. Co. v. Minneapolis, 232 U. C. 430, 438, 58 L. Ed. 671, 674, 34 Sup. Ct. Rep. 400: 'It is well settled that railroad corporations may be required, at their own expense, not only to abolish existing grade crossings, but also to build and maintain suitable bridges or viaducts to carry highways, newly laid out, over their tracks, or to carry their tracks over such highways.' Missouri P. R. Co. v. Omaha, 235 U. S. 121, 59 L. Ed. 157, 35 Sup. Ct. Rep. 82; Northern P. R. Co. v. Puget Sound & W. H. R. Co., 250 U. S. 332, 63 L. Ed. 1013, 39 Sup. Ct. Rep. 474. For although the statement is said to be explained as a matter of state law by the previous decisions in Minnesota, it is made without reference to those decisions or to any local rule; and, more-

over, the intimation of the judgment in the present case is that, whatever may have been the earlier rulings, the law of New Jersey now adopts the same view.

"But it is argued that the order is unreasonable in the circumstances to which we have adverted, the principle applied to the regulation of public service corporations being invoked. Mississippi R. Commission v. Mobile & O. R. Co., 244 U. S. 388, 391, 61 L. Ed. 1216, 1219, 37 Sup. Ct. Rep. 602; Chicago, B. & Q. R. Co. v. Railroad Commission, 237 U. S. 220, 59 L. Ed. 926, P. U. R. 1915 C, 309, 35 Sup. Ct. Rep. 560. But the extent of the states' power varies in different cases from absolute to qualified, somewhat as the privilege in respect of inflicting pecuniary damage varies. The power of the state over grade crossings derives little light from cases on the power to regulate trains."

[fol. 186-9] The language quoted by this court from the Erie Railroad case is so forceful and apt to the controversy of the appellant as to the alleged ordinance contract, that there is an impulse to requote it by way of emphasis; and particularly in the following language:

"To engage in interstate commerce the railroad must get on to the land; and, to get on to it, must comply with the conditions imposed by the state for the safety of its citizens. Contracts made by the road are made subject to the possible exercise of the sovereign right."

Since the order of the Commission in the instant case is concededly, under all the authorities (see also additional authorities cited in Brief of Appellees, p. 53), an exercise of the police power of the state, and a proper and justifiable exercise of such power, then it conclusively follows that the alleged contract claimed under section 9 of Ordinance No. 74 of the City of South McAlester, passed November 8, 1901, can not be interposed as an obstruction to the exercise of that power, for there can be no proposition more definitely, clearly and unalterably settled as to the powers of municipalities, and no wall of limitation more permanently and impassably drawn around the exercise of municipal contractual powers than this, that the police power of the state held and reserved for the public in general as well as the public in each particular municipal locality, can not by contract, or otherwise, be surrendered, bartered away, limited or abridged by one jot or tittle, either by contract or otherwise. In indestructibility, in perpetuity of existence, in all things, it is co-[fol. 186-10] extensive with the Constitution itself and can not be surrendered by the people themselves. Many authorities laying down these doctrines have been cited in the brief of the appellees and further argument or citation of authorities would be just cause for criticism as useless imposition upon the court.

But after all, what is this vaunted much-talked-of "contract," of which the appellant makes so much and on account of which it complains so grievously that its constitutional rights are being impaired? Is it a contract; or is it a mere nudum pactum? What consideration

has ever been paid for it? Was it appellant's contribution toward the construction of the underpass at Cherokee Avenue or of the viaduct at Grand Avenue? If this be contended, then the City of South McAlester, Indian Territory, had the right of eminent domain which it could have exercised at that time. If so, the City of South McAlester, Oklahoma, had the right upon the advent of statehood to have exercised the right of eminent domain and to have placed the entire cost of these improvements upon the appellant, where as now it is within the discretion of the Commission to apportion only a part of the cost, not less than one-half, upon the appellant; and besides this, this section dealing with the viaduct at Grand Avenue makes the viaduct the property of the city and undertakes to cast upon it the exclusive cost of subsequent maintenance, thereby to relieve the appellant of its statutory duty in that behalf. Was it the trivial cost of installing the few planks at the grade crossing at Delaware, Monroe and Miami Avenues? Is it because of some claim that Co-
[fol. 186-11] manche Avenue is included in a general scheme that all other crossings over the appellant's line in the City of McAlester and the city's future rights to condemn such crossings are perpetually closed and shut up, except upon such terms as the appellant may prescribe? If so, out of its own mouth it is condemned under all the authorities as utterly beyond the power of the town council as a vain attempt to sell its birthright for a mess of pottage.

Some provisions of Ordinance No. 74 have been fully executed between the parties and as to these, of course, no question exists. Even as to those which have been executed, all the conditions were not strictly performed as claimed by appellant, as, for instance, Delaware Avenue was not vacated and closed upon the construction of the undergrade crossing at Cherokee Avenue, notwithstanding Section 7 provides that it shall be.

But Section 9, which is the one in controversy, is severable and certainly has no supporting consideration in the agreement elsewhere found in the ordinance to keep forever closed and vacated all other streets and avenues across appellant's right of way except the limited few mentioned. Such a claim would be fatal to its validity as fully shown by the authorities cited in the brief of Appellees (pp. —).

Section 9, then, stands apart from the other provisions and we search in vain for any consideration whatever to support it. The appellant claims that Comanche Avenue has never been opened across its right of way. This claim is true, and the Court correctly so de-
[fol. 186-12] cides, and further finds and decides that the crossing ordered by the Corporation Commission can not be constructed until, by proper condemnation proceedings, Comanche Avenue has been opened across appellant's right of way. But according to appellant's contention, the payment of all the cost of the crossing, the Act of 1919 and the previous statute to the cont-ary notwithstanding is an indispensable condition to such condemnation proceeding. So we come back at the last, in travelling this circle, to the generic essence of Section 9, which is that it undertakes to barter away, to limit and abridge the city's right of eminent domain, and the police power of the state with reference to the public highways, which we all know

can not be done. Nothing else can be made of it. That is the spirit and essence and manifest object and purpose of it, and it is perpetual. No limitation is set to its duration in point of time, nor in changes of condition.

But if it were not void on account of its subject matter and because not supported by any legal or valuable consideration, it is so indefinite and leaves the things to be performed by the city so exclusively to the arbitrary option and execution of the railway company as to render it void and unenforcible on that account. For instance, the appellant contends that the city has not the right to open the crossing upon being willing to pay all the costs, but that the appellant has the right in the first instance to resist the opening of Comanche Avenue, thus implying that the city must first resort to the courts to enforce its right to have the crossing. This certainly does not [fol. 186-13] bestow upon the city the certain and definite right of having the crossing even upon payment of the cost. Therefore, no certain right to the city arises to anything except the privilege to first wage its battle in court to obtain the crossing. Then again, there is no certainty as to how the expense to the city may be regulated, but this is left to the arbitrary terms which the railway company may impose, for it is provided that the crossing "shall be constructed upon plans and specifications to be approved by the said railway company," and there is no limit as to the nature and extent of those plans and specifications. Under it the railway company may prescribe all manner of requirements which in the judgment of the city or of disinterested judges might not be necessary. This is not mere conjecture, but is actually shown in the testimony of Mr. Z. G. Hopkins testifying for the railway company (Record, pp. 92-97, Brief of Appellant, pp. 27-28), who says that the opening of such crossing will require the raising of the tracks of the railway company, which the testimony shows to be laid upon a high dump passing north and south through the city, and, of course, the plans and specifications prescribed by the railway company would require the elevation of the railway tracks along this dump, involving in this alone an item of expense which no reasonable person could have guessed would be ever involved in the construction of the crossing, and which would be necessarily great as the witness says there is a very difficult grade at that point. The city's view as to this point is that if the tracks [fol. 186-14] are not sufficiently high to permit the underpass crossing (which, however, is not shown to be a fact), the same could be overcome by a slight depression in the surface of the underpass. But Section 9 leaves the plans and specifications to the sole approval of the railway company. Section 9 further provides that the city shall bear the cost of all "grade crossings over any side tracks of the said railway company that now exists, or that may hereafter be established upon the grade of said Comanche Avenue," shall be borne by the city and, of course, upon plans and specifications to be approved by the railway company. Mr. Hopkins says that it would be probably necessary to lower certain of their industry tracks and raise the main line tracks and the estimate of total expense would be in excess of $28,000. Items as to paving and curb were also suggested. These

changing conditions and those which may ensue in the subsequent growth and development of the city and the varying requirements of the railway engineers since all is left by the plain terms of Section 9 to their discretion and approval, render it so uncertain as to what the cost might be, besides leaving it to the arbitrary discretion and requirement of the railway company, which might place the cost to such points as to be beyond the willingness or ability of the city to perform, or to be prohibitive, render the alleged contract unenforcible, even if it were a contract existing between ordinary persons dealing with some ordinary business project. This proposition rests upon principles so plain and well known that we deem the citation of authorities unnecessary.

[fol. 186-15] The alleged contract being beyond the power of the city council of South McAlester, Indian Territory, to make, neither it nor its successor, the City of McAlester, Oklahoma, is bound by it, nor can there be any estoppel against asserting its illegality.

In Newport v. Railway Co., 58 Ark. 270, the town of Newport had made a contract with the Batesville & Brinkley Railway Co. to construct a levee on two sides of the town to protect it from overflow, and to pay the company therefor in warrants of the town $10,000, and the railway company was to have the privilege of using the levee as a road bed for its railway. One line of the levee was completed, accepted and paid for by the town, after which it refused to accept and pay for the other line of the levee, and the company having completed the levee according to the contract, brought the suit to recover a balance of $4,480.00 alleged to be due on the contract. The answer of the town admitted its attempt to execute the contract, but says the contract was made for the purpose of inducing the railway company to locate and construct its railway through the town and to establish a station there, and denies the power of the town to make the contract. In holding that the contract was ultra vires and that the railway company could not recover, the court, among other things, said:

"Had the incorporated town of Newport the power to make the contract which was the foundation of this suit?

"In 1 Dillon, Mun. Corp. Sec. 89, it is said: 'It is a general and undisputed proposition of law that a municipal corporation possesses [fol. 186-16] and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.'

* * * * * * *

"In Minturn v. Larue, 23 Howard, 435, the court said: 'It is a well settled rule of construction of grants by the legislature to corporations, whether public or private, that only such powers and

rights can be exercised under them as are clearly comprehended within the records of the act or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public.'

* * * * * * *

"Was the contract such as could be ratified by accepting the benefit of work done under it, or is the town estopped by permitting the work to be done under it and accepting the benefit of such work?

"In Schumm v. Seymour, 24 N. J. Eq. 144, it is said: 'It is a general and fundamental principle of law, that all persons contracting with a municipal corporation must, at their peril, inquire into the power of the corporation, or its officers, to make the contract. And a contract beyond the scope of the corporate powers is void.' 'The doctrine of equitable estoppel has no place in a case where usurped powers have been exercised by municipal officers, who, in so doing, were contravening public policy, as well as known positive law."

* * * * * * *

[fol. 186-17] "Judge Dillon, in Sec. 463, 1 Dillon on Municipal Corporations, states the law in this behalf plainly and tersely, thus: 'A municipal corporation may ratify the unauthorized acts and contracts of its agents or officers, which are within the scope of the corporate powers, but not otherwise. * * * But a subsequent ratification cannot make valid an unlawful act without the scope of corporate authority. An absolute excess of authority by the officers of a corporation, in violation of law, cannot be upheld; and where the officers of such a body fail to pursue the requirements of a statutory enactment under which they are acting the corporation is not bound. In such cases the statute must be strictly followed; and a person who deals with a municipal body is obliged to see that its charter has been fully complied with; when this is not done, no subsequent act of the corporation can make an ultra vires contract effective.'

"As the contract sued in in this case was without the scope of the corporate powers of the incorporated town of Newport, it could not be ratified, and the town was not estopped to deny its invalidity by having accepted and received the benefit of work done under it, with the knowledge and consent of the town."

This Akansas case construing municipal contracts was decided under the provisions of Mansfield's Digest which governed in the City of South McAlester at the time of the passage of the ordinance. The same rigorous rule of construction prevails throughout the Oklahoma cases.

O'Neil Engineering Co. v. Incorporated Town of Ryan, et al., 32 Okl. 738, 124 Pac. 19.

City of Enid, et al. v. Warner-Quinlan Asphalt Co., 62 Okl. 139, 161 Pac. 1092.

[fol. 186-18] Michael v. City of Atoka, 76 Okl. 266, 185 Pac. 96.
Hyde v. City of Altus, 92 Okl. 170, 218 Pac. 1081.

The appellant in its petition for rehearing insists that the court read the authorities listed by it. We examined these cases and discussed some of them in our brief herein (pp. 82-85). We have again read these cases, but it would require too much space to analyze all of them. Upon examination they will be found to be cases of executed contracts, and in addition, all of them, with possibly one exception, involve business contracts, and not the police power of the state or the power to condemn for public highways.

Take the case of Atlas Life Ins. Co. v. Board of Education, 200 Pac. 171, and this related to a lease for 99 years, executed by the Board of Education of the City of Tulsa, and is manifestly without application.

Take the Oklahoma case of Crump v. Guyer, 60 Okl. 222, 157 Pac. 321, and the question there was upon an attorney's lien claim for a fee.

Take the case of State ex rel. v. City of Carthage, 55 (57) S. W. 1008, where the city granted a mill race across certain streets upon condition that the same should not interfere with the ordinary use of the street. Across the street, there being already a natural ditch or stream across the street, the grantee constructed a bridge which was washed away, and a dispute arising as to whether it was the duty of the grantee to rebuild the bridge, a contract was executed [fol. 186-19] by which the grantee paid a certain sum of money in consideration that the city would rebuild and thereafter maintain the bridge, which was done. This, of course, was not only an executed but a business contract, and not pertinent.

In Hitchcock v. City of Galveston, 96 U. S. 341, 24 L. Ed. 659, the City Council having power to do so, entered into a contract wth another to construct certain sidewalks which were constructed, and the city's obligation to pay for the same was upheld. This was both an executed and a business contract.

The case of Enid City Railway Co. v. City of Enid, 43 Okl. 778, 144 Pac. 617, also an Oklahoma case, which we noticed in our former brief (pp. 83-4) there was a contract whereby to induce the street railway company to construct its lines, a clause was inserted that it should only be required to pave 6½ inches on the outside of its tracks, and this was held to be valid notwithstanding a subsequent general statute requiring street railways to pave a larger space, but this was also an executed contract, and in addition it was specifically pointed out in the case of Chicago, Rock Island & Pacific Railway Co. v. Taylor, 79 Okl. 142, 192 Pac. 349, where the Enid city case was relied upon, that the case did not involve the exercise of the police power of the state.

An examination of the other cases cited by appellant will reveal the same inapplicability. Appellant has also by typewritten supplement to its brief called attention to the case of Louisiana Public

Service Commission v. Morgan's Louisiana & Texas Railroad & [fol. 186-20] Steamship Co., — U. S. —, 68 L. Ed. 423 (Advance Sheet, May 1, 1924). The facts in that case were that the City of New Orleans had purchased by definite contract a franchise over the railroad company's right of way for the use of a street railway upon express condition that the grantee (the city) should pay both for the erection and subsequent maintenance of the viaduct over the railway company's property, all of which was done, and afterward, the viaduct having fallen into disrepair and neither the city nor street railway company restoring the same, the Louisiana Public Service Commission ordered the railroad company to do so, it was held, in the first place, that it was not apparent that the Louisiana statute had been given jurisdiction to make the order over the railroad company as to the City of New Orleans, and that it would take very clear and definite language in the statute to such effect before the court would hold that the state had undertaken to authorize the Public Service Commission to order the railroad company to repair the viaduct in the face of the express and executed contract on the part of the city to construct and repair the viaduct. There is no parallel here with the instant case, and besides, the intimation is that if the statute had expressly bestowed jurisdiction on the Public Service Commission to order such changes in the City of New Orleans, that it would have power to do so notwithstanding the contract and the prior performance under it by the City of New Orleans.

It is clear, therefore, in our opinion that none of the cases cited by appellant uphold its position or vindicate the proposition that [fol. 186-21] any contract which abrogates or surrenders the police power in such regard is of any force or validity.

In closing this response to appellant's petition for a rehearing, and in further support of the decision in this case, we call attention to the further case of Galveston Wharf Co. v. City of Galveston, 260 U. S. 473, 67 L. Ed. 355, where the city by contract with a wharf owner had become part owner of the wharf, which ownership it was provided in the contract was to be inalienable, except by a four-fifths vote of the qualified voters of the city, and the city having amended its charter so as to authorize it to acquire the joint property by condemnation upon a majority vote, and being about to do so, the wharf company undertook to enjoin the same upon the ground that it would impair the obligation of its contract and deprive the plaintiff of its property without due process of law, contrary to the Constitution of the United States; further alleging that it had made large expenditures to improve the property at its own cost, and the Supreme Court said:

"Without going into greater detail we will assume that the alleged contract was made and bound the city, and that its terms will be departed from if the city should exercise the new power. The bill alleges that the proper officers will declare the amendments adopted, and that, unless restrained, the city 'will attempt to partition said property or condemn the same, or both,' and prays for

an injunction against attempting to enforce the amendments in any manner so far as the above-mentioned property is concerned. [fol. 186-22] The case was heard upon the pleadings and documentary evidence, but it is unnecessary to state them further since the decree went upon the ground that the bill did not state a case within the jurisdiction of the court.

"We are of opinion that the decree was right. If the bill can be taken to allege sufficiently any threat and intent of the defendant, it does not show that the city will go beyond an exercise of the right of eminent domain. The allegation is, 'will attempt to partition or condemn.' If questions can be raised about the constitutionality of the ordinance authorizing partition, the city may confine itself to condemnation, and will, so far as appears. But there is nothing to prevent the exercise of eminent domain by the legislative power. West River Bridge Co. v. Dix, 6 How. 507, 12 L. Ed. 535; Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 41 L. Ed. 1165, 17 Sup. Ct. Rep. 718; Pennsylvania Hospital v. Philadelphia, 245 U. S. 20, 62 L. Ed. 124, 38 Sup. Ct. Rep. 35. These cases not only dispose of the objection based upon the contract, but also show the difference between an attempt to transfer property from one private person to another, and the taking it for public administration by a public body. 166 U. S. 694. There is no question about the principle, and therefore there is no substantial Federal question raised by the bill. This seems to us so plain that we have not thought it necessary to consider whether the suit was prematurely brought."

One more case and we will desist. In State of Georgia v. City of Chattanooga, — U. S. —, 68 L. Ed. 399 (Advance Sheet, May 1, 1924, decided April 7, 1924), the state of Georgia having enterprised a railroad into and through a portion of Tennessee and into the City of Chattanooga, and having acquired lands there for a railway station and terminal facilities, and the City of Chattanooga [fol. 186-23] having subsequently grown and expanded so as to require the opening of a street through the railway station grounds, the city undertook by condemnation proceedings to condemn the necessary right of way for the street, and the State of Georgia obtained leave to file its bill of complaint in the Supreme Court of the United States to enjoin the same on the ground, among others, of the impairment of its contract. In dismissing the bill of the State of Georgia upon the motion of the city, the Supreme Court said:

"The power of Tennessee, or of Chattanooga as its grantee, to take land for a street, is not impaired by the fact that a sister state owns the land for railroad purposes. Having acquired land in another state for the purpose of using it in a private capacity, Georgia can claim no sovereign immunity or privilege in respect of its expropriation. The terms on which Tennessee gave Georgia permission to acquire and use the land, and Georgia's acceptance,

amount to consent that Georgia may be made a party to condemnation proceedings.

"The power of eminent domain is an attribute of sovereignty, and inheres in every independent state. Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 406, 25 L. Ed. 206, 207; United States v. Jones, 109 U. S. 513, 518, 27 L. Ed. 1015, 1017, 3 Sup. Ct. Rep. 346; Shoemaker v. United States, 147 U. S. 282, 300, 37 L. Ed. 170, 185, 13 Sup. Ct. Rep. 327; Cincinnati v. Louisville & N. R. Co., 22 U. S. 390, 404, 56 L. Ed. 481, 485, 32 Sup. Ct. Rep. 267. The taking of private property for public use upon just compensation is so often necessary for the proper performance of governmental functions that the power is deemed to be essential to the life of the state. It cannot be surrendered, and, if attempted to be [fol. 186-24] contracted away, it may be resumed at will. Pennsylvania Hospital v. Philadelphia, 245 U. S. 20, 62 L. Ed. 124, 38 Sup. Ct. Rep. 35; Galveston Wharf Co. v. Galveston, 260 U. S. 473, 67 L. Ed. 355, 43 Sup. Ct. Rep. 168. It is superior to property rights (Kohl v. United States, 91 U. S. 367, 371, 23 L. Ed. 449, 451); and extends to all property within the jurisdiction of the state—to lands already devoted to railway use, as well as to other lands within the state (United States v. Gettysburg Electric R. Co., 160 U. S. 668, 685, 40 L. Ed. 576, 582, 16 Sup. Ct. Rep. 427; Adirondack [illegible] Co. v. New York, 176 U. S. 335, 346, 44 L. Ed. 492, 498, 20 Sup. Ct. Rep. 460)."

We, therefore, insist that the appellant's petition and application for a rehearing be denied.

Horton & Gill, E. S. Ratliff, Attorneys for Appellees.

[fol. 187] In Supreme Court of Oklahoma

[Title omitted]

Order Overruling Petition for Rehearing—Sept. 30, 1924

And now on this day, it is ordered by the court that the petition for rehearing filed in the above cause be, and the same is hereby denied.

[fol. 188] [File endorsement omitted]

In Supreme Court of Oklahoma

[Title omitted]

Order Staying Mandate—Filed Oct. 1, 1924

This court having, on September 30th, 1924, denied the application and petition of plaintiff in error for a rehearing of the above

entitled cause, and the plaintiff in error now showing to the court that it desires to appeal to the United States Supreme Court from such action and the judgment rendered herein.

It is therefore, for good cause shown, ordered by the court that mandate to the trial court in this case be withheld pending determination of the case by the United States Supreme Court.

Dated this first day of October, 1924.

N. E. McNeill, Chief Justice.

Attest: Wm. M. Franklin, Clerk Supreme Court of Oklahoma, by Reuel Haskell, Jr., Asst. (Seal.)

[fol. 189] IN SUPREME COURT OF OKLAHOMA

CLERK'S CERTIFICATE

I, Wm. M. Franklin, Clerk of said Court, do hereby certify that the foregoing pages numbered from 1 to 189 inclusive, are a true, full and complete transcript of the record and proceedings, in the Supreme Court of Oklahoma in the case of Missouri, Kansas & Texas Railway Company and United States Fidelity and Guaranty Company, appellants and plaintiffs in error, vs. The State of Oklahoma, and City of McAlester, Oklahoma, appellees and defendants in error, and also of the opinion of the court rendered therein and the plaintiffs in error's petition for a rehearing and the order of the court denying same, all as same now appear on file and of record in my office as such Clerk.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the Supreme Court of Oklahoma at the City of Oklahoma City this 28th day of October, 1924.

Wm. M. Franklin, Clerk Supreme Court of Oklahoma, by Reuel Haskell, Jr., Assistant. (Seal of Supreme Court, State of Oklahoma.)

[fol. 190] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION AS TO PARTS OF RECORD TO BE PRINTED—Filed Dec. 6, 1924

It is hereby stipulated and agreed by and between counsel of record for plaintiffs in error and defendants in error that in order to save expense in the printing of the record herein, the following portions of the record, the same being sufficient to show the errors complained of, both on writ of error and on writ of certiorari, shall be printed, except the following:

The entire record shall be printed except all cross examination and all re-direct examination of the witness E. M. Frye. (Rec. pp. 49-61); and except

All evidence of the following witnesses:

G. W. Shields (Rec. pp. 77-90).
J. L. Halbrook (Rec. pp. 91-94).
J. C. Bentley (Rec. pp. 95-97).
J. S. Gilbertson (Rec. pp. 98-100).
J. B. Vogel (Rec. pp. 100-101).
All maps and blue prints (Rec. pp. —).

It is further stipulated and agreed that if, from any oversight or omission, any necessary part of the record be not printed, that the plaintiffs in error shall have the right or be required by defendants in error to print any further or additional portions thereof.

Dated this 1st day of November, 1924.

Joseph M. Bryson, Maurice D. Green, Howard L. Smith, Attorneys for Plaintiffs in Error. E. S. Ratliff, W. J. Horton, Attorneys for Defendants in Error.

[fol. 191] [Endorsed:] No. —. In the Supreme Court of the United States. Missouri, Kansas & Texas Railway Company et al., Plaintiffs in Error, vs. The State of Oklahoma et al., Defendants in Error. Stipulation as to Printing Record.

[fol. 192] [File endorsement omitted.]

Endorsed on cover: File No. 30,694. Oklahoma Supreme Court. Term No. 729. Missouri, Kansas & Texas Railway Company and United States Fidelity and Guaranty Company, plaintiffs in error, vs. The State of Oklahoma and the City of McAlester, Oklahoma. Filed November 17, 1924. File No. 30,694.

DENIED JAN 12 1925

No. [redacted] 205

In the Supreme Court of the United States

October Term, [redacted] 1925

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, AND UNITED STATES FIDELITY AND GUARANTY COMPANY, Petitioners,

vs.

THE STATE OF OKLAHOMA, AND THE CITY OF MCALESTER, OKLAHOMA, Respondents.

Petition for Writ of *Certiorari*, and Argument in Support of Same.

JOSEPH W. BRYSON,
CHARLES A. MOSS,
MAURICE D. GREEN,
EDWARD L. SMITH,
Attorneys for Petitioners.

AUTHORITIES CITED.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 729.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, AND UNITED STATES FIDELITY AND GUARANTY COMPANY, ***Petitioners,***

vs.

THE STATE OF OKLAHOMA, AND THE CITY OF McALESTER, OKLAHOMA, ***Respondents.***

PETITION FOR WRIT OF *CERTIORARI.*

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Missouri, Kansas & Texas Railway Company and United States Fidelity and Guaranty Company, respectfully present to this court this, their petition for a writ of *certiorari,* to be directed to the Supreme Court of the State of Oklahoma, commanding said court and the clerk thereof to certify to this court the record and pro-

ceedings of the case in said court, wherein your petitioner, Missouri, Kansas & Texas Railway Company was appellant, and the respondents, the State of Oklahoma and the City of McAlester, Oklahoma, were the appellees, together with the opinion of said court therein, for the review and determination of said cause by this court.

Your petitioners respectfully represent and show to this court that said cause was an appeal by your petitioners from an order of the Corporation Commission of the State of Oklahoma, dated June 16, 1922, by the terms of which your petitioner Railway Company was ordered, directed and required to prepare a plan for a subway crossing of Comanche Avenue, under and across said petitioner's premises in McAlester, Oklahoma, as prayed for by the City of McAlester, together with an estimate of the cost thereof, and said Railway Company and said City were further ordered and directed to undertake to agree on an apportionment of the cost thereof, and said Railway Company was required to have said underpass crossing completed and opened for traffic within ninety days from the date said City should arrange to pay its proportion of the cost.

Your petitioners further represent and show to this honorable court that said Railway Company defended said proceeding before the Corporation Commission of Oklahoma, and before the Supreme Court of the State of Oklahoma, on the ground, not only

that Comanche Avenue had never been extended, by condemnation proceedings or otherwise, over the right-of-way and premises of the Railway Company at said proposed point of crossing, but that a contract existed between said City and said Railway Company, covered by Ordinance No. 74, passed and approved November 8, 1901, by the terms of which it was agreed that if said Comanche Avenue should ever be extended across said Railway Company's premises, it should be by an underpass crossing at the sole cost and expense of said City, in consideration of which, and in consideration of other matters agreed to in said ordinance as to other street crossings, said Railway Company agreed to waive any and all claims for damages because of the opening and extending of said Comanche Avenue over its premises.

Your petitioners further represent and show to this honorable court that the said order of the Corporation Commission of Oklahoma and decision of the Supreme Court of Oklahoma, affirming the same, in effect holds the said contract to be of no force or validity, and that the Corporation Commission had full and exclusive jurisdiction under sections 3491 to 3497, both inclusive, of the Compiled Laws of Oklahoma of 1921, purporting to give exclusive jurisdiction to the Corporation Commission over highway crossings with railroads, including the necessity for and the place and manner of such cross-

ing, and the protection to be required, said law having been passed by the Oklahoma Legislature in 1919.

Your petitioners further respectfully represent and show to this honorable court that, while the Supreme Court of Oklahoma, in its opinion, held that said Railway Company was entitled to compensation for its property taken for the street, which should be determined by proper condemnation proceedings, yet, as shown by the certified copy of the record herewith as "Exhibit A" hereto, and the opinion of the Supreme Court of Oklahoma therein of December 11, 1923, and its action of September 30, 1924, overruling your petitioners' petition for a rehearing, said court declined to refer to or pass on the validity of said contract ordinance, or the contentions of your petitioners as to their rights thereunder or to their contentions duly asserted by them in their petition in error before that court, and in their briefs in support of same; that the order of the Corporation Commission of Oklahoma in refusing to recognize the validity of said contract ordinance, and to abide by its terms, and in making its order contrary thereto, and requiring your petitioner, Railway Company, to bear a portion of the cost and expense of said proposed subway crossing, resulted in the taking of your petitioner Railway Company's property without due process of law, and without compensation, and denied to it the equal protection of

the law, in violation of the Fourteenth Amendment to the Constitution of the United States, and denied to it the right of contract, and impaired the obligation of contracts, in violation of section 10 of article I of the Constitution of the United States.

Your petitioners further state that the said decision of the Supreme Court of Oklahoma, in affirming said order of the Corporation Commission of Oklahoma, in effect denies the validity of said contract ordinance, and imposes burdens, obligations and duties upon your petitioner Railway Company contrary thereto, and in conflict therewith, and denies your petitioners' constitutional rights and immunities, as hereinabove set out.

Your petitioners further respectfully represent and show to this honorable court that, for the reason given herein, a right, title, privilege and immunity claimed by them under the Fourteenth Amendment of the Constitution of the United States and under section 10 of article I of the Constitution of the United States, is denied to them, and the decision of the Supreme Court of Oklahoma, is against such right, title, privilege and immunity so especially set up and claimed by them.

Your petitioners further respectfully show to the court that writ of error has been allowed herein by the chief justice of the Supreme Court of Oklahoma, and the proceedings in this court thereunder are docketed as No. 729 of the October term, 1924,

of this court, and this petition for writ of *certiorari* is being filed in these same proceedings before this court.

Wherefore, your petitioners respectfully pray that a writ of *certiorari* may issue out of and under the seal of this court, directed to the Supreme Court of the State of Oklahoma, sitting at Oklahoma City, Okla., commanding said court to certify and send to this court on a day to be designated, a full and complete transcript of the record and all proceedings of the said Supreme Court of the State of Oklahoma had in said cause, to the end that the said cause may be reviewed and determined by this honorable court, as provided by law, and that the judgment of the Supreme Court of the State of Oklahoma may be reversed by this honorable court, and that your petitioners may have such other and further relief and remedy in the premises as to this court may seem appropriate and in conformity with law, and your petitioners will ever pray.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY AND UNITED STATES FIDELITY AND GUARANTY COMPANY,

By Joseph M. Bryson

.....

.....

.....

Attorneys for Petitioners.

State of Oklahoma,
Muskogee County.—ss.

Maurice D. Green, being first duly sworn, on his oath says that he is one of the attorneys for the petitioners in the above case, that he has read the foregoing petition and knows the contents thereof, and that the allegations therein contained are true, as he verily believes.

.....

Subscribed and sworn to before me this ... day of November, 1924.

.....
Notary Public.

My commission expires .....

I hereby certify that I have examined the foregoing petition and in my opinion the said petition is well founded in law.

.....
Attorney for Petitioner.

ARGUMENT.

This proceeding was commenced by petition by the City of McAlester, Oklahoma, formerly the City of South McAlester, Indian Territory, before the Corporation Commission of Oklahoma, for an order to require petitioner Railway Company to establish and construct at its own sole cost and expense a subway or underhead crossing of Comanche Avenue under the track and across the premises of the Railway Company in said City, which avenue had never been extended over the Railway Company's premises. Petitioner Railway Company's right-of-way and premises were acquired by land grant of the Congress of the United States by Act of Congress of July 25, 1866, 14 Statutes at Large, page 36, petitioner's name then being Union Pacific Railway Company, Southern Branch, and its road was constructed through said City in the years 1872 and 1873.

On November 8, 1901, petitioner Railway Company and said respondent City entered into a contract covered by Ordinance No. 74, providing for certain street crossings then deemed necessary over said Railway Company's premises in said City, and providing further for the terms and conditions under which any additional street crossings might thereafter be extended over said Railway Com-

pany's premises, it being further provided that the Railway Company reserved the right to contest the question of necessity for the opening of any additional streets, and that, as to Comanche Avenue here involved, it was provided in Sec. 9, in said ordinance, that if such avenue should ever be opened across the Railway Company's premises, it should be by an undergrade crossing, at the sole cost and expense of said respondent City, in part consideration of which the Railway Company agreed to waive all claim for damages for the land taken for said Avenue over its premises.

While the Supreme Court of Oklahoma did not directly refer to the constitutional questions presented to it by petitioners, yet the effect of its decision affirming the order of the Corporation Commission is to deny petitioners' constitutional rights, as set up in this petition for *certiorari*. The state court cannot ignore federal constitutional questions and undertake to base its decision on non-federal grounds, and thereby prevent petitioners having the right of review by this court.

—*West Chicago Street Railway Co.* v. *People*, 201 U. S. 506, 50 L. ed. 845;

Ward v. *Board of County Commissioners*, 253 U. S. 17, 64 L. ed. 751.

This court will determine for itself whether or not Ordinance No. 74 was a valid and binding con-

tract between petitioner Railway Company and respondent City.

—*Georgia Railway & Power Co.* v. *Town of Decatur*, 262 U. S. 432, 67 L. ed. 1065.

Petitioner Railway Company's title to its land grant right-of-way and premises is in the nature of a fee title.

—*Missouri, Kansas & Texas Railway Co.* v. *Roberts*, 152 U. S. 114, 38 L. ed. 377;

New Mexico v. *United States Trust Company*, 172 U. S. 171, 43 L. ed. 407.

Petitioner Railway Company's right-of-way and premises are within the protecting clauses of the federal constitution

—*United States* v. *Northern Pacific Railway Company*, 256 U. S. 51, 65 L. ed. 825.

There is a limit to the police power of the cities, beyond which the attempted exercise thereof becomes the taking of property in violation of the Fourteenth Amendment to the Federal Constitution.

—*Martin* v. *District of Columbia*, 205 U. S. 135, 51 L. ed. 743.

At the time petitioner Railway Company and respondent City entered into the contract in question, the City existed under the laws of Arkansas, in force in the Indian Territory, as contained in Mansfield's Digest of the Statutes of Arkansas of 1884, extended over Indian Territory by Act of Con-

gress of February 18, 1901, 31 Stat. 794, by the terms and provisions of sections 749, 760, 764 and 907 of which the City had the power to lay out streets and acquire the ground therefor, resorting to condemnation, if necessary, these sections reading as follows:

> "*Sec. 749.* Cities or incorporated towns, organized or to be organized under the provisions of this act, shall be, and are hereby declared to be bodies politic and corporated, under the name and style of 'the city of .....' or 'the incorporated town of .....,' as the case may be; capable to sue and be sued, to contract and be contracted with, to acquire, hold and possess, property, real and personal; to have a common seal, and to change and alter the same at pleasure, and to exercise such other powers and to have such other privileges as are incident to other corporations of like character or degree, not inconsistent with the provisions of this act or the general laws of the state."
>
> "*Sec. 760.* They shall have power to lay off, open, widen, straighten and establish, to improve and keep in order and repair, and to light streets, alleys, public grounds, wharves, landing places and market places; to open and construct and keep in order and repair sewers and drains *(j)*; to enter upon, or take, for such of the above purposes as may be required, land or material, and to assess and collect a charge on the owner or owners of any lot or land, or on lots or lands through or by which a street, alley or public highway shall pass, for the purpose of defraying the expenses of constructing, improving, repairing or lighting such street, alley or public highway, to be in proportion to the

value of such lot or land as assessed for taxation under the general law of the state."

"*Sec. 764.* Municipal corporations shall have power to make and publish, from time to time, by-laws or ordinances, not inconsistent with the laws of the state, for carrying into effect or discharging the powers or duties conferred by the provisions of this act. * * *"

"*Sec. 907.* When it shall be deemed necessary by any municipal corporation to enter upon or take private property for the construction of wharves, levees, parks, squares, market places or other lawful purposes, an application in writing shall be made to the Circuit Court of the proper county or to the judge thereof in vacation, describing as correctly as may be the property to be taken, the object proposed, and the name or names of the owner or owners, and of each lot or parcels thereof known; notice of the time and place of such application shall be given, either personally in the ordinary manner of serving process or by publishing a copy of the application, with a statement of the time and place at which it is to be made, for three weeks next preceding the time of application, in some newspaper of general circulation in the county. If it shall appear to the court or judge that such notice has been served ten days before the time of application, or has been published as provided, and that such notice is reasonably specific and certain, then the court or judge may set a time for the inquiry into and assessment of compensation by a jury before said court or judge."

It is a general rule of law that cities have the power to make such contracts as may be necessary to carry out the powers conferred upon them.

—Dillion's Municipal Corporations, Vol. 1, page 512;
Elliott on Contracts, Vol. 1. Sec. 601.

Contracts similar as to conditions and facts and like in principle, have been upheld by the courts.

—*City of Argentine* v. *Atchison, T. & S. F. Ry. Co.*, (Kansas, 1895) 41 Pac. 946;
Hicks v. *Chesapeake & Ohio Ry. Co.*, (C. of A. Va. 1903) 45 S. E. 888.

As shown by the record presented herewith, petitioner Railway Company and respondent City lived up to and adhered to all of the terms and provisions of this contract up to the time of the filing of the petition herein before the Corporation Commission of Oklahoma, and the City having so repeatedly ratified the contract, should now be estopped from undertaking to repudiate it.

—*State, ex rel. City of Carthage*, v. *Cowgill & Hill Mill Company*, 55 S. W. 1008.

The contract was a private, or business, contract, rather than one affecting the police power of the City, and it is estopped to deny its validity.

—Elliott on Contracts, Vol. 1, Sec. 615;
First National Bank of Red Oak v. *City of Emmettsburg*, (Iowa, 1912) 138 N. W. 451;

Hitchcock, et al., v. *City of Galveston*, 96 U. S. 341, 24 L. ed. 659;

Washington Water Power Company v. *City of Spokane*, (Washington, 1916) 154 Pac. 329;

City of Los Angeles v. *Los Angeles Gas & Electric Corporation*, 251 U. S. 32, 64 L. ed. 121.

The order of the Corporation Commission of Oklahoma is a state law within the meaning of the federal constitution and laws of Congress regulating the appellate jurisdiction of this court over the state courts.

—*Lake Erie & Western Railway Company* v. *State Public Utilities Commission, et al.*, 249 U. S. 422, 63 L. ed. 684.

Both the order of the Corporation Commission of Oklahoma and the 1919 laws of Oklahoma, purporting to give that Commission the jurisdiction to make the order, are unconstitutional and void and violative of the constitutional rights, privileges and immunities of petitioner Railway Company, as herein set out.

—*Louisiana Public Service Commission* v. *Morgan's Louisiana & Texas Railroad and Steamship Company*, decided by this court April 7, 1924; same case below, 287 Fed. 398;

Allgeyer v. *State*, 165 U. S. 578, 41 L. ed. 832.

Further citation of authorities is not considered necessary here, but if this honorable court should grant this petition for *certiorari*, the questions involved will be more fully and thoroughly presented in such further briefs as this court may permit.

Respectfully submitted,

JOSEPH M. BRYSON,
CHARLES S. BURG,
MAURICE D. GREEN,
HOWARD L. SMITH,
Attorneys for Petitioners.

No. 205

In the Supreme Court of the United States

October Term, 1926.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, AND UNITED STATES FIDELITY AND GUARANTY COMPANY, *Plaintiffs in Error,*

VERSUS

THE STATE OF OKLAHOMA, AND THE CITY OF McALESTER, OKLAHOMA, *Defendants in Error.*

IN ERROR TO SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF OF PLAINTIFFS IN ERROR.

JOSEPH M. BRYSON,
CHARLES S. BURG,
MAURICE D. GREEN,
HOWARD L. SMITH,
Attorneys for Plaintiffs in Error.

SUBJECT INDEX.

Argument.

I.

TABLE OF CASES.

TABLE OF CASES—CONTINUED.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

No. 729

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, AND UNITED STATES FIDELITY AND GUARANTY COMPANY, *Plaintiffs in Error,*

vs.

THE STATE OF OKLAHOMA, AND THE CITY OF McALESTER, OKLAHOMA, *Defendants in Error.*

IN ERROR TO SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF *of* PLAINTIFFS *in* ERROR.

Grounds on Which the Jurisdiction of This Court Is Invoked.

Plaintiffs in error above named show to the court that this case is brought here by writ of error from the judgment of the Supreme Court of Oklahoma of December 11th, 1923 (R. 69), rehearing denied September 30th, 1924 (R. 94), the decision and opinion of the court not yet being officially reported, but found in 229 Pac. 172; said cause being an appeal by plaintiffs in error from an order of the Corporation Commission of Oklahoma dated June 16, 1922 (R. 64-6), by the terms of which order and decision of said court plaintiff in error, Railway Company, was ordered, directed and required to prepare a plan for a subway cross-

ing of Comanche Avenue across its premises in McAlester, Oklahoma, as prayed for by the City of McAlester in its petition (R. 9-11), together with an estimate of the cost thereof, and said Railway Company and said City were further ordered and directed to undertake to agree on an apportionment of the cost thereof, and said Railway Company was required to have said underpass crossing completed and opened for traffic within ninety days from the date said City should arrange to pay its proportion of the cost.

Plaintiffs in error contended then, and contend now, not only that Comanche Avenue had never been extended by condemnation proceedings or otherwise over the right of way and premises of the Railway Company at said proposed point of crossing (R. 14), but that a contract existed between said City and said Railway Company covered by Ordinance No. 74, passed and approved November 8th, 1901 (R. 48), by the terms of which it was agreed, among other things, that if said Comanche Avenue should ever be extended over said Railway Company's premises, it should be by an underpass crossing at the sole cost and expense of said city, in consideration of which and in consideration of other matters agreed to in said ordinance as to other street crossings, said Railway Company agreed to waive any and all claims for damages because of the opening and extending of said Comanche Avenue over its premises. At the hearing before the Corporation Commission the Railway Company, by its witness, Z. G. Hopkins, stated that it did not object to the opening of the crossing, if found necessary, and if opened pursuant to the provisions of contract Ordinance No. 74 (R. 35). The Corporation Commis-

sion, in its opinion and order, referred to the contract Ordinance No. 74, but held that under the statutes of Oklahoma then in effect it had full jurisdiction of the controversy, regardless of said ordinance (R. 64-5), and the Supreme Court of Oklahoma affirmed the said opinion and order without referring to the contract ordinance or the contentions of the Railway Company regarding same, that the Commission's order resulted in the taking of the Railway Company's property without due process of law and without compensation, and denied to it the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States, and denied to it the right of contract and impaired the obligation of contracts in violation of section 10, article I, of the Constitution of the United States, and that the Oklahoma statutes relied on, being sections 3491 to 3497, both inclusive, of the Complied Laws of Oklahoma, 1921, if construed to authorize the Commission's action, were unconstitutional and in violation of the Railway Company's constitutional rights as above stated; the Supreme Court holding that under the Oklahoma statutes above mentioned the Corporation Commission had the jurisdiction and power to make the order complained of, insofar as it required the Railway Company to participate in the cost of the construction of the subway crossing. The Supreme Court of Oklahoma did, however, hold that before the order of the Commission would become operative the City would have to acquire, by condemnation proceedings or otherwise, the right to extend Comanche Avenue crossing over the Railway Company's premises, and that the Railway Company would be entitled to compensation for its property taken therefor.

Plaintiffs in error invoke the jurisdiction of this court by writ of error under the provisions of section 237 of the Judicial Code, 36 Stat. 1156, as amended by Act of December 23, 1914, 38 Stat. 790; Act of September 6, 1916, 39 Stat. 726, and Act of February 17, 1922, 42 Stat. 366, the Supreme Court of Oklahoma being the highest court of the state in which a decision in the case could be had, and it is contended that this court's jurisdiction is sustained by the following authorities:

In *Chicago, B. & Q. R. Co.* v. *Nebraska, ex rel. City of Omaha*, 170 U. S. 57, 42 L. ed. 948, involving a somewhat similar controversy, but distinguished from this case on some features in that there was a pre-existing statutory duty of the Railway Company to construct the improvement, this court, on the jurisdictional question, said:

> "We have often had occasion to say that this court, when reviewing the final judgment of a state court upholding a state enactment alleged to be in violation of a contract clause of the constitution, possesses paramount authority to determine for itself the existence or the non-existence of the contract set up, and whether its obligation has been impaired by the state enactment. *Jefferson Branch Bank* v. *Skelly*, 66 U. S. 1 Black 436 (17:173); *Mississippi & M. Railroad Co.* v. *Rock*, 71 U. S. 4 Wall. 177 (18:381); *New Orleans Waterworks Co.* v. *Louisiana Sugar Ref. Co.*, 125 U. S. 18 (31:607); *Mobile & Ohio Railroad Co.* v. *Tennessee*, 153 U. S. 492 (38:796).
>
> "We shall proceed, therefore, to examine whether the statutes and ordinances to which the plaintiff in error points us constituted a contract within the protection of the Constitution of the United States, and whether such contract, if found to exist, has been impaired by the subsequent statute and the proceedings thereunder."

The order of the Corporation Commission of Oklahoma is a state law within the meaning of the Federal Constitution and laws of Congress regulating the appellate jurisdiction of this court over the state courts.

—*Lake Erie & Western R. Co.* v. *State Public Utilities Commission, et al.*, 249 U. S. 422, 63 L. ed. 684.

This court will determine for itself whether or not the contract ordinance relied on was a valid and binding contract between the parties hereto.

—*Georgia Railway & Power Co.* v. *Town of Decatur*, 262 U. S. 432, 67 L. ed. 1065.

The Railway Company's right of way and premises are within the protecting clause of the federal constitution.

—*United States* v. *Northern Pacific R. Co.*, 256 U. S. 51, 65 L. ed. 825.

The state court cannot ignore or fail to directly mention or pass on the federal constitutional questions involved, nor undertake to base its decision on non-federal grounds and thereby prevent plaintiffs in error from having the right of review by this court.

—*West Chicago Street R. Co.* v. *People*, 201 U. S. 506, 50 L. ed. 845;

Ward v. *Board of County Commissioners*, 253 U. S. 17, 64 L. ed. 751.

Statement of the Case and Matters Material to the Consideration of the Questions Presented.

The petition of the City, omitting caption and signatures, is as follows:

"Comes now the Incorporated City of McAlester, Oklahoma, petitioner herein, and complaining of the

Missouri, Kansas & Texas Railway Company and Chas. E. Schaff as its receiver operating its properties, respondents, says:

That the petitioner, the Incorporated City of McAlester, Oklahoma, is a municipal corporation and a city of the first class organized as such under the laws of the State of Oklahoma and laid out into city blocks, lots, streets and alleys, according to the official map and plat thereof approved by the Acting Secretary of the Interior, February 14, 1901, under authority of the laws of the United States; that it is also divided into six wards numbered First, Second, Third, Fourth, Fifth and Sixth Wards, with city public schools in each ward and a high school in the First Ward; that it has a population of over .... inhabitants, with residence and wholesale and retail business districts; with railroads and union passenger and freight depots, street car lines and interurban lines.

That Comanche Avenue is one of the public streets and highways of said City of McAlester appearing on said map and plat of said City and extends in an east and west direction from the Second Ward to the Third Ward of said City, and that the city public school of the Third Ward is located thereon, and that the Second and Third Wards contain a large population, rendering free and unobstructed passageway along said Comanche Avenue highly necessary to the convenience and necessities of the residents of said wards of said City.

That the said Missouri, Kansas & Texas Railway Company is a steam railway, and that said Chas. Schaff is the receiver of its properties, operating the same, and that the said steam railway, in passing through the City in a north and south direction, separates the Second Ward lying on its east, from the Third Ward, lying on the west line thereof, and that said Comanche Avenue crosses the right of way of said railway company, but that at the point of its intersection therewith there exists a very high embankment, upon the top of which is situated the tracks and roadbed of the said

railway line, by reason whereof said Comanche Avenue is completely closed and obstructed at said point.

That the City Council of the said City of McAlester, Oklahoma, on September 19, 1921, enacted and passed a resolution declaring the necessity for a crossing upon, over or under the track, road bed and right-of-way of said Missouri, Kansas & Texas Railway Company where said Comanche Avenue intersects therewith, and by said resolution directed that application be made to said Corporation Commission for an order requiring said Missouri, Kansas & Texas Railway Company and said Chas. E. Schaff, its receiver operating its properties, to construct and maintain a public highway crossing at said intersection, a copy of said resolution being hereto attached and made a part hereof and marked Exhibit 'A.'

Wherefore, the premises considered, the petitioner, the Incorporated City of McAlester, Oklahoma, prays that an order be made and entered by the Corporation Commission requiring said Missouri, Kansas & Texas Railway Company and its said receiver, Chas. E. Schaff, to construct and maintain at its and his cost and expense a public highway crossing at the said intersection of said Comanche Avenue with said steam Railway Company in such manner as to open the same for passageway and travel by pedestrians and vehicles along and over said Comanche Avenue." (R. 9.)

Exhibit "A" to the petition, is the resolution attached to the petition, and by which the city manager and city attorney were authorized to file the petition and make application for the order (R. 11).

Under the state procedure before the Corporation Commission it was not necessary and the Railway Company did not file any pleading.

EVIDENCE.

Testimony on Behalf of the City.

ROSE EWENS, city clerk, testified as to the passing of the resolution above mentioned, which was attached to the City's petition (R. 13). The other witnesses for the city (R. 15-31) testified as to the public necessity for the opening of Comanche Avenue across the Railway Company's premises.

Evidence on Behalf of Railway Company.

ROSE D. EWENS, city clerk, testified as to the correctness of Ordinance No. 74 (R. 32), and the acceptance thereof by the Railway Company, the Railway Company's "Exhibit 5" (R. 48), which ordinance and acceptance read as follows:

"ORDINANCE No. 74.

An Ordinance to provide for street crossings across the right-of-way, station grounds and tracks of the Missouri, Kansas & Texas Railway Company, in the City of South McAlester, upon the lines of certain streets as laid out by the Townsite Commission's surveys in lieu of other crossings now in use, and which, upon completion of the new crossings herein provided for, shall be vacated and closed; and for other purposes;

Be It Ordained by the Council of the City of South McAlester:

Section 1. That Monroe Avenue, Grand Avenue, Delaware Avenue, and Miami Avenue, shall be and hereby are opened across and over the right-of-way, station grounds and tracks of the Missouri, Kansas & Texas Railway Company, in the City of South McAlester by grade crossings at Monroe and Miami Avenues,

and by an overgrade crossing at Grand Avenue, and by an undergrade crossing of the main and passing tracks at Delaware Avenue, and by a grade crossing of the side tracks now constructed, and those hereafter to be constructed at Delaware Avenue, all as hereinafter provided:

Section 2. The expense of constructing said grade crossings at Monroe and Miami Avenues shall be borne by the Missouri, Kansas & Texas Railway Company, and said crossings shall be constructed by said Railway Company, plank in its tracks on the inside by planks thirty feet long and three inches thick, and one plank on the outside of its rails of the same length and thickness.

Section 3. The overhead crossing at Grand Avenue shall be by a two span iron bridge, resting on two abutments and one pier upon the right-of-way or grounds of the said Railway Company, according to plans to be prepared by the City, but subject to the approval of the said Railway Company.

Section 4. The crossing at Delaware Avenue shall be by planking the side tracks, as in section two (2) hereof, and by an ordinary dirt road under bridge number three hundred and twenty-six (326) of the said Railway Company, and between the bents on the north side of the present water way, the grade of said undergrade crossing to be about six feet above the bed of the present water course.

Section 5. In consideration of the Missouri, Kansas & Texas Railway Company agreeing to the opening of said streets across its said right-of-way, station grounds and tracks aforesaid, and its paying for the construction of said grade crossings at Monroe and Miami Avenues as in section two herein provided, and its agreeing to the erection and maintenance of said bridge across its said right-of-way, station grounds and tracks at Grand Avenue, as aforesaid, and its further

agreement to furnish, in the first instance the necessary material and labor for constructing said Grand Avenue bridge for the City, as well as the necessary labor and material for opening the crossing at Delaware Avenue, as in section four hereof provided, and its further agreement to contribute to the City one-half of the actual cost of said Grand Avenue bridge and said crossing at Delaware Avenue, the City hereby agrees to vacate and forever close the present grade crossing over the railway company's tracks at or near the alley shown on the townsite commission's map, and lying between Grand Avenue and Choctaw Avenue, and extending through block number three hundred and fifty-one (351), and also to vacate and close all other crossings over said railway company's tracks, except those herein provided for, and upon the completion of said crossings herein provided for, all other crossings including the present grade crossings between Grand Avenue and Choctaw Avenue, shall be and hereby are vacated and closed; and the city further agrees that it will hereafter open no other street crossings or alleyways over, across or under the right-of-way, station grounds and tracks of the said Railway Company, except and provided it shall pay to the said Railway Company, as agreed, stipulated and liquidated damages in any proceedings instituted by the said City for the opening or condemnation of a right-of-way over, across or under the right-of-way, station grounds and tracks of the said Railway Company, any judgment, finding, verdict or assessment of damages of any court, jury, commission or other tribunal at the time having authority to assess said damages to the contrary notwithstanding, and whether for more or less than the agreed sum, namely:

Should Choctaw Avenue be opened over, across or under the right-of-way, tracks and station grounds of the Railway Company, the City shall pay the said Railway Company, as agreed, stipulated and liquidated damages, in the sum of twenty thousand dollars ($20,000.00);

Should any other crossing, alleyway or street be opened across the Railway Company's premises through block number three hundred and fifty-one (351), the City shall pay to the Railway Company, as agreed, stipulated and liquidated damages the sum of fifteen thousand dollars ($15,000.00);

Should any other street or alleyway except Washington Avenue or Comanche Avenue, be opened across, over or under the right-of-way, station grounds and tracks of the Railway Company the City shall pay to the said Railway Company as agreed, stipulated and liquidated damages, the sum of ten thousand dollars ($10,000.00) for each and every other of said crossings, and in addition thereto, damages equal to the actual value of any buildings or other improvements of the Railway Company damaged or destroyed by the opening of any street or crossing; provided that nothing herein contained shall constitute a waiver on the part of the Railway Company to contest the opening of any additional streets other than those herein provided for.

Section 6. The City of South McAlester shall and hereby agrees to pay to the said Missouri, Kansas & Texas Railway Company one-half of the actual cost of the construction of said Grand Avenue and Delaware Avenue crossings, as above provided for, when and as soon as the City of South McAlester has the lawful right to collect from the said Missouri, Kansas & Texas Railway Company, taxes levied against its right-of-way, buildings and other improvements or property in the City of South McAlester, in annual installments equal to the amounts of the taxes that may be collected by the said City from the said Railway Company as taxes until said annual installments or sums so paid by the said City of South McAlester to the said Railway Company shall equal one-half of the actual cost of the said Grand Avenue and Delaware Avenue crossings; provided that upon the completion of said crossings the said Railway Company shall render to the City

a bill showing the actual cost of said crossings, and the proportion thereof so to be paid by the City.

Section 7. It is understood and agreed, however, that, if at any time, after five years from the date of the passage of this ordinance, the City of South McAlester shall desire an undergrade crossing at Cherokee Avenue, and the crossing at Delaware Avenue herein provided for shall be vacated and closed, that the Railway shall consent that said undergrade crossing at Cherokee Avenue shall be constructed, and contribute towards the construction thereof, one-half of the actual cost thereof, provided said crossing can be constructed at a cost of not to exceed seven thousand and five hundred dollars ($7500.00) but should said crossing cost more than seven thousand and five hundred dollars ($7500.00) then said Railway Company shall in additon thereto, contribute the entire cost of said crossing over and above the sum of three thousand and seven hundred and fifty dollars ($3750.00) which is to be the maximum sum paid by the City. And said crossing at Cherokee Avenue shall be made by planking the side tracks as provided in section two hereof, and by an ordinary dirt road under the main and other tracks of said road built upon the top of the fill of said road, and above the present grade of said Cherokee Avenue. The proportion of the cost of said Cherokee Avenue crossing to be paid by the City in annual installments in the manner provided in section six of this ordinance, for other crossings; but the amount to be paid by the City in any one year to said Railway Company on account of the construction of said crossing not to exceed the amount of taxes so as hereinabove provided, to be paid in any one year by said Railway Company to the City. *Provided*, however, that should Delaware Avenue ever be closed, as herein provided, the City of South McAlester shall have the right to pass its sewer pipes under the tracks of the said Railway Company at the place herein provided for Delaware Avenue crossing said right-of-way, and the said Railway Company shall have the right to connect

its sewers with the said sewers of the City of South McAlester at any point where said sewers shall cross through said right-of-way of said Railway Company, under plans and specifications to be approved by the said Missouri, Kansas & Texas Railway Company, and *provided further*, that it is hereby understood and agreed that should the City of South McAlester desire to construct such crossing at Cherokee Avenue across the right-of-way of said Railway Company, at any time, prior to the five years from the date of the passage of this ordinance, it may do so, at its sole expense, under plans and specifications to be approved by the said Railway Company.

Section 8. The overgrade bridge crossing at Grand Avenue shall be and remain the exclusive property of the City of South McAlester.

Section 9. It is hereby understood and agreed that if at any time in the future, the City of South McAlester shall desire to open and establish a crossing of Comanche Avenue or Washington Avenue, or both of them, across the right-of-way and station grounds of the said Railway Company that it may do so upon the following terms: the crossing at Comanche Avenue shall be constructed as an undergrade crossing under the main and other tracks of the said Railway Company located upon the fill of said Company, and above the present grade of Comanche Avenue, and a grade crossing over any side tracks of the said Railway Company that now exist or that may be hereafter established upon the grade of said Comanche Avenue; and the crossing at Washington Avenue shall be an overhead bridge crossing, and both of said crossings, at Comanche Avenue and Washington Avenue, shall be constructed upon plans and specifications to be approved by the said Railway Company, and at the sole cost and expense of the said City of South McAlester. The Railway Company hereby agreeing in consideration of the other matters and things expressed in this ordinance, to

waive any and all claims for damages because of the opening and establishing of either or both of said Comanche and Washington Avenue crossings. And it is further understood and agreed that the said overgrade bridge if it shall be built at Washington Avenue, shall be and remain the exclusive property of the City of South McAlester.

Section 10. This ordinance shall be in full force and effect from and after its passage and publication, and the written acceptance of the same on the part of the Missouri, Kansas & Texas Railway Company, acting through its vice president and general manager, has been filed with the clerk of the City of South McAlester.

Passed and approved this 8th day of November, 1901.

FIELDING LEWIS, *Mayor.*

A. A. POWE, *City Clerk.*

The above entitled Ordinance, number 74, entitled 'An Ordinance to provide for street crossings across the right of way, station grounds and tracks of the Missouri, Kansas & Texas Railway Company in the City of South McAlester, upon the lines of certain streets as laid out by the townsite commission's survey in lieu of other crossings now in use, and which, upon the completion of the new crossings herein provided for, shall be vacated and closed, and for other purposes,' passed by the council and approved by the Mayor of the City of South McAlester, on the 8th day of November, A. D. 1901, hereby accepted by the said Missouri, Kansas & Texas Railway Company, and this acceptance is endorsed upon the original ordinance and is to be filed with the clerk of the City of South McAlester in accordance with section 10 of said ordinance.

Missouri, Kansas & Texas
Railway Company,

By A. A. ALLEN,

Its Vice President & General Manager."

The witness then identified resolutions numbers 1, 2, 3 and 4, passed and approved by the City authorities in April, 1909, and which were offered for the purpose of showing that the City had actually ratified and lived up to the old contract Ordinance No. 74 since its passage and approval (R. 33).

These resolutions will not be quoted in full in this brief, but are found at pages 45 to 47 of the record, and cover the agreements of the City to pay and the actual payment of the various amounts by the City to be paid on the crossings constructed under the old contract Ordinance No. 74, including Delaware Avenue, Grand Avenue and Cherokee Avenue crossings.

The Railway also introduced in evidence the record in the case of *Missouri, Kansas & Texas Railway Company* v. *City of McAlester*, being friendly suit in the Superior Court at McAlester, Oklahoma, by which the Railway recovered judgment against the City for the balance due under contract Ordinance No. 74 covering the City's part of the cost of the street crossings in question, the date of the judgment being April 17, 1912 (R. 53).

Z. G. HOPKINS, called on behalf of the Railway, testified substantially as follows: So far as the opening of an undergrade crossing at Comanche Avenue is concerned, the Railway would not object to it if it is opened in conformity with contract Ordinance No. 74, which we consider is a contract made by the Railway and the City and carried out in good faith on our part. However, the opening of such crossing without the lowering of our tracks as we go south and reduction of the grades, would necessitate raising the track at Comanche Avenue and the points between there

and Delaware, which, until such time as our grade is reduced, would be a disadvantage to us because we have a very difficult grade situation at this point. Our own plans, independent of the proposed Comanche Avenue crossing, contemplate a reduction of that grade sometime, we hope, in the near future, depending on our financial situation. Aside from this and from an engineering standpoint, it is feasible, in the opinion of our chief engineer, to construct a reinforced concrete girder or probably twenty-four feet clear span to carry our tracks over the roadway. It would probably also be necessary to lower certain of our industry tracks and raise the main line tracks and the estimate of the total expense would be in excess of $28,000.00 and the opening of the undergrade crossing would be of no benefit to us unless it carried with it the elimination of grade crossings such as Ottawa.

It is possible that at a relatively small expense, as compared to grade separation at Comanche Avenue, a satisfactory crossing could be secured at Delaware. It has two 24-foot spans. It is not paved, but could be paved, and railings could be provided (R. 34-38).

Cross Examination.

My estimate of $28,000.00 was exclusive (inclusive) of the other changes necessary, such as the raising of the grade and the lowering of the industry tracks. I am unable to say what portion of that sum covers the cost of raising the grade. Approximately $18,000.00 would cover the cost of the structure to carry the tracks. The other portion would be raising the grade and lowering the industry tracks and paving. We have made no detailed plan for the crossing. The result of the investigation of our chief engineer is that

it will be necessary to raise the grade in order to provide an underhead crossing of Comanche Avenue, and my observation on the ground would seem to me to make it necessary. That is a matter for the engineers (R. 38-45).

The Corporation Commission's order of June 16, 1923 (R. 64), need not be considered in its entirety, but the following portion is important:

> "A copy of the City Ordinance No. 74 was presented showing an agreement between the City of McAlester and the M., K. & T. Railway in the City of McAlester. This ordinance was passed by the City on the 8th day of November, 1901, which provided for certain crossings and how the City could acquire other crossings, and provided for Comanche Avenue crossings, to-wit:
>
> > 'Should any other street or alleyway except Washington or Comanche Avenue, be opened across, over or under the right of way, station grounds, and tracks of the Railway Company, the City shall pay to the said Railway Company as agreed, stipulated and liquidated damages, the sum of ten thousand dollars ($10,000.00) for each and every other of said crossings, and in addition thereto damages equal to the actual value of any buildings or other improvements of the Railway Company damaged or destroyed by the opening of any street or crossing; provided that nothing herein contained shall constitute a waiver on the part of the Railway Company to contest the opening of any additional streets other than those herein provided for.'
>
> The Railway Company filed brief covering the above stipulation, contending that the Commission was without jurisdiction in reference to this application, setting forth various decisions. The Commission interprets the 1919 Session Laws to give them full jurisdiction over highway crossings where highway passes over

or under, or at grade of steam or electric railroads or railways.

The evidence disclosed that the crossing asked for is essential; that the Katy south from the Rock Island crossing is on a high fill for a major portion of the distance in the corporate limits. The topography in the vicinity of the proposed crossing makes Comanche Avenue the most practicable route to and from the business district of McAlester, especially from the south half of the City; that the present highways in the vicinity of Comanche are inadequate and hazardous and are located, to-wit: From Comanche Boulevard, Delaware Avenue is located 1569½′ north. This crossing is an underpass and takes care of the drainage from Sand Creek and the sewerage from the City. The nearest crossing south of Comanche Avenue is on Ottawa Avenue. It is a grade crossing and is located 730.5′ south of Comanche Avenue. If Comanche Avenue was provided it would be of material benefit for east and west traffic, and especially to residents living in the southwest portion of the City.

The Commission, after giving all facts due consideration and realizing the necessity of grade separation where same is practical, *it is therefore ordered*, that the M., K. & T. Railway Company prepare a plan for reinforced concrete subway on Comanche Avenue as prayed for by applicants, the plan to provide for two openings of not less than 14′ horizontal and 12′ vertical clearance, together with an estimated cost showing quantities. The plan for underpass to show the location of drainage and industrial tracks, the track to conform to highway grade on Comanche Avenue. The above estimate and plan is to be filed with the Mayor of McAlester and the Corporation Commission on or before August 15, 1922.

It is further ordered, that on the failure of the M., K. & T. Railway Company and the City of McAlester to agree on the apportion of cost in the construction

of underpass on Comanche Avenue, the Commission will hear further evidence covering the division of cost or change in plan, the date to be set when the applicants or defendants advise the Commission that they are unable to agree as to the division of cost.

It is further ordered, that the M., K. & T. Railway Company shall have the underpass on Comanche Avenue in the City of McAlester constructed and opened for traffic within 90 days from the date the City of McAlester has arranged to pay their apportion of cost of constructing the subway.

Done at Oklahoma City, Oklahoma, this 16th day of June, 1922."

It will be noted that the Commission's above order quotes a part of section 5 of the contract ordinance as applying to Comanche Avenue, whereas section 9 thereof is the applicable provision.

Syllabi 1 to 4, both inclusive, of the opinion of the Supreme Court of Oklahoma (R. 69) will suffice to show the decision of that court:

"1. *Constitutional Provisions.* The various sections of article 9 of the constitution create the Corporation Commission, confer and define certain duties and powers, and vest it with certain specific jurisdiction, and section 19, *Id.*, after conferring certain jurisdiction upon the Corporation Commission to control corporations within the state, provides:

> 'The Commission may be vested with such additional powers and charged with such other duties * * * as may be prescribed by law.'

2. *Statutory Provisions.* Pursuant to the power conferred upon it by the above constitutional provision, the legislature, by chapter 15, Comp. Stat., 1921, vested the Corporation Commission with additional juris-

diction and powers and charged it with additional duties, among which is as follows:

> 'The Corporation Commission is given full jurisdiction over all public highway crossings, where same cross steam or electric railroads or railways within the State of Oklahoma.' Section 3491.

3. *Railroads. Corporation Commission May Order Construction of Highway Crossings.* Under the foregoing section, in connection with other sections of chapter 15, Comp. Stat., 1921, the Corporation Commission has full jurisdiction over all public highway crossings and has authority to order such crossings to be constructed, as it may be petitioned by proper authorities to do, and authority to make an estimate of the cost of construction of such crossings and to assess the cost of same against the petitioners and the Railroad Company, according to its sound discretion and judgment, and to enforce, as provided by law, its orders for the construction of same.

4. *Constitutional Provisions.* Article 2, section 24, of the constitution provides specifically: 'Private property shall not be taken or damaged for public use without just compensation.' Hence, where a railroad company owns the fee in its right of way, such right of way cannot be appropriated or damaged for public use without compensation, either by amicable settlement or by proper condemnation proceedings."

SPECIFICATIONS *of* ERROR.

I.

The Corporation Commission of Oklahoma and the Supreme Court of Oklahoma erred in holding and deciding that the Commission had jurisdiction and authority to impose upon the plaintiffs in error any requirements or conditions other than or different from those contained in the contract Ordinance No. 74 (assignment of error 1, R. 3).

II.

The Corporation Commission of Oklahoma and the Supreme Court of Oklahoma erred in holding and deciding that the plaintiffs in error could lawfully be ordered and directed to prepare plans for the undergrade crossing, with an estimated cost thereof, and to undertake to agree with the City of McAlester on an apportionment of the cost and to report to the Commission any failure to agree, to the end that further hearing might be had covering a division of the cost between the Railway Company and the City, and to construct said crossing, same constituting a taking of plaintiff in error's property without due process of law and without compensation and denying to them the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States (assignment of error 1, R. 3).

III.

The Corporation Commission and the Supreme Court of Oklahoma erred in holding and deciding that the plaintiffs in error could lawfully be ordered and directed to prepare plans for the undergrade crossing, with an estimated

cost thereof, and to undertake to agree with the City of McAlester on an apportionment of the cost and to report to the Commission any failure to agree, to the end that further hearing might be had covering a division of the cost between the Railway Company and the City, and to construct said crossing, same in effect denying plaintiffs in error the right of contract, and impairs the obligation of contracts in violation of section 10, article I of the Constitution of the United States (assignment of error 2, R. 4).

IV.

The Corporation Commission of Oklahoma and the Supreme Court of Oklahoma erred in holding and deciding that the Commission had jurisdiction and power under sections 3491 to 3497, Compiled Laws of Oklahoma, 1921, to make the order complained of and that said statutes were valid and constitutional and were not repugnant to the Constitution of the United States or in contravention thereof and did not result in the taking of plaintiffs in error's property without due process of law, or compensation, or deny to them the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States and deny to them the right of contract, or impair the obligation of contracts, in violation of section 10, article I, of the Constitution of the United States (assignment of error 3, R. 5).

ARGUMENT.

I.

The order of the Corporation Commission and decision of the Supreme Court of Oklahoma are contrary to and in conflict with the contract Ordinance No. 74 and void and deny plaintiffs in error the right of contract and impair the obligation of contracts, in violation of section 10, article I of the Constitution of the United States, and take plaintiffs in error's property without due process of law and without compensation and deny them the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States. *(Specifications of Error I, II and III.)*

SUMMARY OF ARGUMENT UNDER SUB-HEAD I.

(a) Statement of issues and relative rights and powers of City and Railway Company and validity of contract.

AUTHORITIES.

Act of Congress of June 28, 1898.

Act of Congress of July 25, 1866, 14 Stat. 36.

Missouri, K. & T. R. Co. v. *Roberts,* 152 U. S. 114, 38 L. ed. 377.

New Mexico v. *United States Trust Co.,* 172 U. S. 171, 43 L. ed. 407.

St. Louis & S. F. R. Co. v. *Love,* 29 Okl. 523, 118 Pac. 259.

Mansfield's Digest of the Statutes of 1884.

Act of Congress of May 2, 1890, 26 Stat. 81.

28 Cyc 634-5-6.

Dillon's Municipal Corporations, (4th ed.) Vol. 1, p. 512.

Elliott on Contracts, Vol. 1, Sec. 601.

15 Cyc 821.

Florida East Coast R. Co. v. *City of Miami,* 79 Sou. 682.

Butchers' Union S. H. & L. S. L. Co. v. *Cresent City L. S. L. & S. H. Co.,* 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652.

Secs. 3491-2-3-4-5, Oklahoma Compiled Statutes, 1921.

Morgan's Louisiana, etc., R. Co. v. *Louisiana Public Service Commission,* 287 Fed. 390.

Louisiana Public Service Commission v. *Morgan's Louisana, etc., R. Co.,* 264 U. S. 393, 68 L. ed. 756.

A. T. & S. F. R. Co. v. *Shawnee,* 183 Fed. 85, 105 C. C. A. 377.

V. S. & P. R. Co. v. Monroe, 48 L. Ann. 1102, 20 Sou. 664.

City of Argentine v. *Atchison, T. & S. F. R. Co.,* 41 Pac. 946.

Hicks v. *Chesapeake & O. R. Co.,* 45 S. E. 888.

Noble v. *City of Richmond,* 31 Grat. 271, 31 Am. Rep. 726.

(b) City has continually ratified contract.

(c) City is estopped from repudiating contract.

AUTHORITIES.

State, ex rel. City of Carthage, v. *Cowgill & Hill Mill Company,* 55 S. W. 1008.

Elliott on Contracts, Vol. 1, Sec. 615.

First National Bank of Red Oak v. *City of Emmetsburg,* 138 N. W. 451.

(d) Contract is a business contract.

AUTHORITIES.

Elliott on Contracts, Vol. 1, Sec. 603.

Elliott on Contracts, Vol. 1, Sec. 615.

City of Tulsa v. *Oklahoma Natural Gas Co.*, 4 Fed. (2d) 399.

Mansfield's Digest, Ark., Secs. 749, 754, 755.

Los Angeles v. *Los Angeles Gas & Elec. Corp.*, 251 U. S. 32, 64 L. ed. 121.

(e) Contract is not *ultra vires* and city cannot be heard to so contend.

AUTHORITIES.

Atlas Life Ins. Co. v. *Board of Education of the City of Tulsa*, 200 Pac. 171.

Hitchcock, et al., v. *City of Galveston*, 96 U. S. 341, 24 L. ed. 659.

Washington Water Power Co. v. *City of Spokane*, 154 Pac. 329.

(f) Rights under the contract have vested.

AUTHORITIES.

Schedule to Constitution of Oklahoma, Sec. 1.

Crump v. *Guyer, et al.*, 60 Okl. 222, 157 Pac. 321.

State v. *Julow*, 31 S. W. 781, 29 L. R. A. 257, 50 Am. St. Rep. 443.

Enid City Railway Company v. *City of Enid*, 43 Okl. 778, 144 Pac. 617.

Elliott on Contracts, Vol. 3, Secs. 2725, 2729 and 2763.

(a) *Statement of issues and relative rights and powers of City and Railway Company and validity of contract ordinance.*

As heretofore stated in this brief, this is a proceeding begun by the City of McAlester, Oklahoma, before the Corporation Commission of Oklahoma, to require the plaintiff in error Railway Company to construct at its own expense a subway crossing of Comanche Avenue over its premises

in said city and which resulted in an order of the Commission, affirmed by the Supreme Court, requiring the Railway Company to prepare plans and estimates of costs for such crossing and to undertake to agree with the city on a division of such cost, and to complete such crossing within a specified time, all of which was contrary to and in violation of the contract represented by Ordinance No. 74, passed and approved and accepted long prior to the time of the order of the Commission and the decision of the Supreme Court, and prior to the enactment of the Statute of 1919 by the Legislature of Oklahoma, under which the Commission's order was made and affirmed by the Supreme Court, and by which contract ordinance it was agreed that if such crossing were ever constructed, it would be at the sole cost and expense of the city.

The city is a duly laid out and platted government townsite having been so laid out and platted in the Choctaw Nation in the Indian Territory by the Government Townsite Commission, acting under the Secretary of the Interior pursuant to authority given in the Act of Congress of June 28, 1898, entitled "An Act for the Protection of the People of the Indian Territory, and for Other Purposes."

The Railway Company's right of way and premises were acquired through the Indian Territory and through said City by a land grant Act of Congress of July 25, 1866, 14 Stat. 36, the road being therein named as the Union Pacific Railroad Company, Southern Branch, and the road was constructed through said Indian Territory and said City in 1872-3. The Railway Company therefore has a fee title to its premises, or at least a qualified fee.

—*Missouri, Kansas & Texas R. Co.* v. *Roberts,* 152 U. S. 114, 38 L. ed. 377;

New Mexico v. *United States Trust Co.*, 172 U. S. 171, 43 L. ed. 407;

St. Louis & S. F. R. Co. v. *Love*, 29 Okl. 523, 118 Pac. 259.

The Supreme Court of Oklahoma, without deciding, but ignoring the contentions of the plaintiffs in error regarding their rights under contract Ordinance No. 74, did, however, hold that before the order of the Corporation Commission would become operative, the City would first have to acquire the right to a crossing by condemnation proceedings or otherwise.

It was the position of the plaintiffs in error that under the contract Ordinance No. 74, while the Railway Company had the right to contest the necessity for the extension of Comanche Avenue over its premises, yet if it should finally be extended, then under its contract with the city, covered by Ordinance No. 74, passed and approved on November 8, 1901, the city was obligated to bear the entire expense of such crossing.

It will be noted from this ordinance that it was passed by the city authorities and accepted in writing by the Railway by its then Vice President and General Manager, Mr. A. A. Allen, with the view of providing by contract for such street crossings over the railway premises as were then deemed necessary, and for the terms under which any street crossings which might in the future be legally extended over its premises should be constructed and maintained. Section 1 of the Ordinance provides for the immediate opening of certain crossings, some at grade, some by overgrade and some by undergrade crossings, and the subsequent sections provide for the manner of construction, the waiver of dam-

ages by the Railway and the division of the expense of construction of the crossings then agreed to be opened, as well as of future crossings, and in the last part of section 5 the Railway reserves the right to contest the opening of all crossings not provided for by section 1, the language of this reservation being as follows:

> "* * * *Provided*, that nothing herein contained shall constitute a waiver on the part of the Railway Company to contest the opening of any additional streets other than those herein provided for."

The Corporation Commission, in its Final Order No. 2071, from which this appeal is taken, by mistake quoted another part of section 5 of the Ordinance as applying to the matter in controversy in this connection, being that of the opening of Comanche Avenue. The provision which does cover the opening of Comanche Avenue is contained in section 9 of the Ordinance, which reads in full as follows:

> "*Section 9.* It is hereby understood and agreed that if at any time in the future the City of South McAlester shall desire to open and establish a crossing of Comanche Avenue or Washington Avenue, or both of them, across the right of way and station grounds of the said railway company, that it may do so upon the following terms: the crossing at Comanche Avenue shall be constructed as an undergrade crossing under the main and other tracks of the said Railway Company located upon the fill of said Company, and above the present grade of Comanche Avenue, and a grade crossing over any side tracks of the said Railway Company that now exist or that may be hereafter established upon the grade of said Comanche Avenue; and the crossing at Washington Avenue shall be an overhead bridge crossing, and both of said crossings at Comanche Avenue and Washington Avenue shall be constructed upon plans and specifications to be approved by the

said Railway Company, and at the sole cost and expense of the said City of South McAlester. The Railway Company hereby agreeing, in consideration of the other matters and things expressed in this ordinance, to waive any and all claims for damages because of the opening and establishing of either or both of said Comanche and Washington Avenue crossings. And it is further understood and agreed that the said overgrade bridge, if it shall be built at Washington Avenue, shall be and remain the exclusive property of the City of South McAlester." (R. 51.)

It will therefore be seen that while the Railway reserves the right to contest the opening of Comanche Avenue, yet if it should ever be legally opened, then the construction of same across the railway premises should be by an undergrade crossing under the main and other tracks on the railway embankment and a grade crossing over the side or industry tracks and on plans to be approved by the Railway, but at the sole cost and expense of the City, the Railway waiving all claims for damages in consideration of the matters therein contained.

At the time this ordinance was passed and approved, the city existed as a city of the Indian Territory under the laws of Arkansas as contained in Mansfield's Digest of the Statutes of 1884, which were extended over the Indian Territory by Act of Congress of May 2, 1890, 26 Stat. 81, and the following are portions of said Arkansas laws so extended over and in force in the Indian Territory at the time said Ordinance was passed:

"*Sec. 749.* Cities or incorporated towns, organized or to be organized under the provisions of this act, shall be, and are hereby declared to be bodies politic and corported, under the name and style of 'the city

of ....,' or 'the incorporated town of ....,' as the case may be; capable to sue and be sued, to contract and be contracted with, to acquire, hold and possess, property real and personal; to have a common seal, and to change and alter the same at pleasure, and to exercise such other powers and to have such other privileges as are incident to other corporations of like character or degree, not inconsistent with the provisions of this act or the general laws of the state."

"*Sec. 760.* They shall have power to lay off, open, widen, straighten and establish, to improve and keep in order and repair, and to light streets, alleys, public grounds, wharves, landing places and market places; to open and construct and keep in order and repair sewers and drains (j); to enter upon, or take, for such of the above purposes as may be required, land or material, and to assess and collect a charge on the owner or owners of any lot or land, or on lots or lands through or by which a street, alley or public highway shall pass, for the purpose of defraying the expenses of constructing, improving, repairing or lighting such street, alley or public highway, to be in proportion to the value of such lot or land as assessed for taxation under the general law of the state."

"*Sec. 764.* Municipal corporations shall have power to make and publish, from time to time, by-laws or ordinances, not inconsistent with the laws of the state, for carrying into effect or discharging the powers or duties conferred by the provisions of this act. * * *"

"*Sec. 907.* When it shall be deemed necessary by any municipal corporation to enter upon or take private property for the construction of wharves, levees, parks, squares, market places or other lawful purposes, an application in writing shall be made to the Circuit Court of the proper county or to the judge thereof in vacation, describing as correctly as may be the property to be taken, the object proposed, and the name or names of the owner or owners, and of each lot or par-

eels thereof known; notice of the time and place of such application shall be given, either personally in the ordinary manner of serving process or by publishing a copy of the application, with a statement of the time and place at which it is to be made, for three weeks next preceding the time of application, in some newspaper of general circulation in the county. If it shall appear to the court or judge that such notice has been served ten days before the time of application, or has been published as provided, and that such notice is reasonably specific and certain, then the court or judge may set a time for the inquiry into and assessment of compensation by a jury before said court or judge."

It will be noted that by these statutes the City was given the power to contract and be contracted with; to lay off and establish public streets, to acquire property therefor and to pass ordinances for carrying into effect or discharging its powers and duties.

It is a general rule of law that the city has power to enter into any contract and to incur any debt necessary to enable it to carry out the particular powers expressly or impliedly conferred upon it, and to adopt all ordinary and usual means necessary to the full execution and enjoyment of such powers. See 28, Cyc 634-5-6; Dillon's Municipal Corporations (4th ed.), Vol. 1, p. 512; see, also, Elliott on Contracts, Vol. 1, Sec. 601, reading in part as follows:

"It is thus made to appear that the powers of a municipal corporation are either express or implied. It possesses not only the powers specifically conferred upon it by its charter, but also such as are necessarily incident to or may fairly be implied from those powers, including all that are essential to the declared object of its existence. The implied power resident in a municipal corporation, is the power necessarily incident

to the exercise of those powers expressly granted and directly and immediately appropriate to their exercise."

The City had the above statutory power to condemn for street crossings, and it had the power to contract therefor, and agree on the compensation therefor, or, in other words, to make this contract, by the terms of which it acquired the right to the various street crossings therein referred to, and the Railway Company waived all claim for damages by reason thereof, and the City agreed to bear certain expenses, including that of the construction of Comanche Avenue crossing now in controversy in this case. Many condemnation statutes provide that an effort at an amicable agreement shall be made as a condition precedent to exercising the right of eminent domain. (15 Cyc 821.) And an agreement such as the one in this case is not in violation of the rights of eminent domain, or the police power, but is in reality in furtherance thereof, as was well said by the Supreme Court of Florida in *Florida East Coast R. Co.* v. *City of Miami,* (1918) 79 Sou. 682, where a similar controversy was determined in favor of the validity of the contract ordinance, and the contentions of the railway company upheld, and in which case that court said:

"We are next confronted with the question whether the city, in contracting to operate the crossing without expense to the railway company, was abdicating the police power of the municipality and its act was illegal and void. The protection of public health, public morals, and public safety is a duty which the state owes to its inhabitants, and they have authorized it to do such things as are necessary for the performance of this duty; it is a sacred trust, and the police power is derived from the necessities of its execution. It is well

settled that the state cannot devest itself, by contract or otherwise, of its police power, but we do not think the case presented here has that aspect. The fallacy in the contention of appellee grows out of its conception of the police power, as the means of paying for protection, rather than protection itself, thus making the payment the main purpose, and public health, morals, and safety, mere incidents.

"We think there is a clear distinction between a contract by the state in reference to a matter within reach of the police power and a contract to suspend or devest itself thereof.

"The Supreme Court of the United States has indicated that it recognizes the distinction in this language: 'While we are not prepared to say that the legislature can make valid contracts on no subject embraced in the largest definition of the police power, we think that, in regard to two subjects so embraced, it cannot, by any contract, limit the exercise of those powers to the prejudice of the general welfare. These are the public health and public morals. The preservation of these is so necessary to the best interests of social organization that a wise policy forbids the legislative body to devest itself of the power to enact laws for the preservation of health and the repression of crime.' *Butchers' Union S. H. & L. S. L. Co.* v. *Crescent City L. S. L. & S. H. Co.*, 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652.

"It is worthy of note that Mr. Justice MILLER drew a distinction between contracts affecting 'public health and public morals' and those affecting 'public safety,' and that, while he condemned contracts which limited the exercise of the power to protect public health and public morals, to the prejudice of the general welfare, the question of a state obligating itself for a valuable and sufficient consideration to pay certain expenses which might be incident to the preservation of the public morals and the protection of the public health was not involved.

"Can it be said that by the contract between the City of Miami and the Florida East Coast Railway the City has limited the exercise of its police power to the prejudice of the general welfare? We do not think so. The City has in no wise limited the exercise of its police power, but, on the contrary, is exercising it; and, if it performs its duty to the public, will continue to do so. There is nothing in the contract whereby the city devests itself of its duty to insure the safety of persons using the crossing. The contention of the appellee that, because the city relieved the railway of the expense of operating the crossing, in consideration of a grant from the railroad by which the city acquired the right to extend Eleventh Street over the railroad's right-of-way, it devested itself of its power to protect the public, is not sound.

"We fail to see wherein there is any surrender of the police power by the city by putting in, operating, and maintaining the crossing; on the contrary, it is exercising its police power when it does this. The question of who pays the expense does not determine whether or not it is a surrender or bartering away of such power. * * *

"In the instant case the City of Miami received from the railway valuable property rights which it could not have taken from it without just compensation. It also received other and greater benefits by the removal of the switching operations, the station and tracks from within the heart of the city to 4 or 5 miles distant. The city, when it entered into this contract with the railway, was no doubt satisfied that it had received ample consideration from the railway for what it agreed to give in return—the expense of operating the crossing.

"Numerous illustrations suggest themselves to show that a contract such as this is not one by which the city devests itself of its police power. Thus, where there was a tract of land within the corporate limits of

a city, on which were mosquito-breeding ponds, marshes, and heavy undergrowth, the city, under its police power, could require the owners to keep the ponds and marshes drained and the undergrowth kept down; but if the owner were to convey this property to the city for use as a public park, and the city, in consideration thereof, should contract to keep the ponds drained and marshes drained and undergrowth kept down, without expense to the owner, it would be clearly within its powers, and such a contract would not be a surrender or bartering away of its police power or its rights to exercise the same. Nor would the city be permitted, after taking possession of the property and converting it into a public park, to repudiate its part of the contract to keep the property drained, and while retaining possession of the property and enjoying the benefits therefrom, require the owner to bear that expense. If the city should subsequently abandon the park and restore the property, it might afterwards require him to bear the expense of keeping it drained, but that question is not presented here, as the City of Miami does not propose to return the street, and from the nature of the acts which have been performed by the railway in accordance with the obligation of its contract, the parties cannot now be restored to the situation in which they were before the contract was entered into."

The order of the Corporation Commission and decision of the Supreme Court of Oklahoma in this case are based on the following sections of the Compiled Oklahoma Statutes of 1921, which read as follows:

"3491. *Jurisdiction of Corporation Commission.* The Corporation Commission is given full jurisdiction over all public highway crossings, where same cross steam or electric railroads or railways within the State of Oklahoma.

"3492. *Expense of Crossings.* The expense of construction and the maintenance of public highway grade

crossings shall be borne by the railroad or railway company involved. For overgrade or undergrade public highway crossings over or under steam or electric railroad or railway, the assignment of cost and maintenance shall be left to the discretion of the Corporation Commission; but in no event shall the city, town or municipality be assessed with more than fifty per cent (50%) of the actual cost of such overgrade or undergrade crossings.

"3493. *Procedure Before Commission.* In all actions arising before the Corporation Commission the same rules as to procedure, notice of hearing and trial, and as to appeals to the Supreme Court, shall be applicable as are prescribed for said Commission, as to transportation companies generally; and the same rules applicable to the enforcement of other orders of the Corporation Commission as to transportation companies shall be applicable to the enforcement of any order or orders made hereunder.

"3494. *Jurisdiction of Commission.* The Corporation Commission shall have exclusive jurisdiction to determine and prescribe the particular location of highway crossings, for steam or electric railways, the protection required, to order the removal of all obstructions as to view of such crossings, to alter or abolish any such crossings, and to require, where practicable, a separation of grade at any such crossing, heretofore or hereafter established.

"3495. *Effect of Partial Invalidity.* The invalidity of any section, subdivision, clause or sentence of this act shall not in any manner affect the validity of the remaining portions thereof."

A somewhat similar controversy was involved in *Morgan's Louisiana, etc., R. Co.* v. *Louisiana Public Service Commission,* in the United States Court for the Eastern District of Louisiana, decision reported in 287 Fed. 390,

where the validity of the contract ordinance was upheld, it being further held that the statutory powers of the Public Service Commission were not broad enough to clearly authorize it to override and supersede the contract between the Railway Company and the City, and the court said:

> "Analyzing the order complained of in this case, it is apparent the Commission is seeking to exercise control over the streets of New Orleans as well as the power of eminent domain. Conceding that the police power can never be contracted away, and that a railroad may be required to construct a crossing over a street, or public road, at its own expense, these principles do not apply to the taking of the private property of a railroad for public use. It is true there is a viaduct already in existence, and the railroad has granted a right-of-way to the public over its property; but it has done so under certain conditions amounting to a contract. To change those conditions now would abrogate the whole contract and restore conditions as they were before. The public could not hold on to the right of passage over the railroad's property without compensation and repudiate the obligations they have assumed, and in consideration of which the right-of-way was granted. *Atchison, T. & S. F. R. Co.* v. *Shawnee,* 183 Fed. 85, 105 C. C. A. 377; *V. S. & P. R. Co.* v. *Monroe,* 48 La. Ann. 1102, 20 South. 664.
>
> "Before the railroad could be required to build a viaduct as ordered, Newton Street would have to be opened across the railroad property. This would require expropriation proceedings instituted by the proper authorities before a competent tribunal. Furthermore, the order requires the use of Newton Street and the building of a structure, with consequent blocking of that street. This certainly is a regulation of the streets and the regulation of its grades."

This decision last above mentioned was affirmed by this court in *Louisiana Public Service Commission* v. *Morgan's*

Louisiana, etc., R. Co., 264 U. S. 393, 68 L. ed. 756, where this court said:

> "It would require more definite language than we find in the Constitution of 1921, or in *Gulf C. & S. F. R. Co.* v. *Louisiana Pub. Serv. Commission,* to convince us that the Commission has power to assume control over all those streets within New Orleans which approach or cross railroad tracks, and to disregard the solemn contracts of the municipality with respect thereto. That the liability which the Commission has undertaken to impose upon appellee conflicts with the contract under which the latter granted permission to construct the viaduct over its property, is not denied. Only very clear and definite words would suffice to show that the state had undertaken to authorize a thing so manifestly unjust and oppressive."

A somewhat similar question was involved in the case of *City of Argentine* v. *Atchison, T. & S. F. R. Co.,* (Kans. 1895) 41 Pac. 946, where the city, by contract with the railway company, undertook and agreed to divide the cost and expense of street crossings by viaduct, the suit being by the railway to collect from the city its portion of the cost of two viaducts constructed in accordance with said agreement, the city contending that it had no authority to make such agreement and was, therefore, not liable. The court held that the contract was valid and binding and that the city was liable and said:

> "It is conceded by the city that it had the power to compel the railroad company to build the viaducts wholly at the expense of the company, and that the city can build them at its own expense under the provisions mentioned there can be little doubt. As the city may construct them entirely at its own expense, no reason is seen why it may not contribute a part of the expense of viaducts determined to be necessary. The questions

of necessity and expediency of viaducts, the character and cost of those which the safety and convenience of the public may require, and the means of providing them, including what proportion of the expenses should be borne by the city and what by the railroad company, are for the determination of the mayor and council, rather than the court. The fact that the city can compel the railroad company to build a viaduct upon certain conditions at its own expense does not prevent the city from sharing the expense under other circumstances where it is deemed to be just that a division of the expense should be made; and that question, like the others which have been mentioned, so far as the municipality is concerned, rests with the legislative authority of the city."

A like case is that of *Hicks* v. *Chesapeake & O. R. Co.*, (Ct. of A., Va. 1903) 45 S. E. 888, the action being for damages for injuries sustained by reason of the alleged failure of the railway company to keep a bridge in repair within the limits of the town of Scottsville. It appears that the railway had a contract with the city by which the city assumed the burden of maintaining the bridge, and the court upheld this contract and said:

"The general law of the state confers upon the town of Scottsville, as upon all municipalities, the power to control and keep its streets in order. Code 1887, Sec. 1038, when a municipality is empowered to control and keep its streets in order, it is charged with a positive duty to do so, and it cannot be relieved from this duty by any act of its own. *Noble* v. *City of Richmond*, 31 Grat. 271, 31 Am. Rep. 726.

"The contention that the contract between the town of Scottsville and the Richmond & Allegheny Railroad Company is *ultra vires* is not tenable. The town cannot deed away the rights of the public to its streets, or transfer to others its duties and obligations with

respect thereto; but it is not unlawful for the municipality, as in the case at bar, to assume the exclusive control and responsibility for its streets. The town of Scottsville had the lawful right to terminate the divided authority over the street in question existing between itself and the railroad; and in making the contract under consideration, by which it assumed the exclusive and undisputed control over its highway, it was only taking upon itself the duty and responsibility imposed upon it by the common law and by statute. The contract in question constitutes a dedication of the bridge by the railroad to the town for the public use, and a complete and formal acceptance thereof by the town, and the defendant in error is thereby released from all responsibility to the public in the premises."

(b) *City has continually ratified contract.*

Inasmuch, therefore, as the City at the time contract Ordinance No. 74 was passed, had the power to provide for the opening of streets and the power to pass ordinances to carry out the power given by the statute and the power to contract therefor, the conclusion would seem to be justified that the contract represented by this contract Ordinance No. 74 is valid and binding. The City has heretofore so considered it, and has lived up to its obligations, as contained in the contract, as shown by the Railway's evidence consisting of the resolution passed and approved by the City after statehood, and in April, 1909, and by the record in the friendly suit in the case of the Railway against the City, No. 1098 on the docket of the Superior Court at McAlester, Oklahoma, wherein judgment was rendered on April 17, 1912, in favor of the Railway and against the City for the amount of its indebtedness under contract Ordinance No. 74 for the cost of construction of certain of the street crossings therein provided for. In the petition of the Rail-

way in that case it set up the contract represented by this Ordinance and the previous history thereof and the acts of the City in ratifying it by the resolutions above referred to, and in the answer filed by the City it will be noted that the City admitted all of the allegations of the Railway's petition. The City has, therefore, continually ratified this contract, and should now be estopped from undertaking to repudiate it.

(c) *City is estopped from repudiating the contract.*

In *State, ex rel. City of Carthage*, v. *Cowgill & Hill Mill Company*, 55 S. W. 1008, the owner of certain real estate made a contract with the city by which it acquired a right of way for a mill race across certain streets, and later made another contract with the city for a valuable consideration by which the city released it from the obligation to repair the bridges extending the streets over said mill race, and the city assumed that burden. A number of years afterwards the city sought to repudiate that contract after having acted in a manner which the court said was consistent with its obligation under the contract, and the court held that it was a fair contract and could not then be repudiated by the city, and said:

> "The city's conduct in this matter, until this suit was brought, has been entirely consistent with its obligation under the agreement. It has kept the bridges in repair, and when the flood came and carried them away it replaced them with the present structures, located so as to indicate a purpose, as suggested by the evidence offered and rejected, to put finer and better structures, more in keeping with the Carthage of today, than would be a duplication of the wooden bridges of 1875. It was a fair agreement made with the mill people; they paid what they agreed, and now good faith and the law alike

require that the city should stand up to the contract on its part. There is a constitutional question in this case which gives this court jurisdiction, but, as the case is disposed of before that question is reached, it is unnecessary to decide it. The evidence makes no case justifying the issuance of the peremptory writ. The judgment of the Circuit Court is reversed. All concur."

In this connection it is said, in Elliott on Contracts, Vol. 1, Sec. 615:

"As a general rule municipal corporations may be estopped by their own act in the exercise of their business powers much the same as any other person or corporation. A municipal corporation may be estopped to deny the validity of a contract as against an innocent party when it has retained the benefit of such contract, it being invalid, not because of want of power on the part of the municipality, but because such power was improperly exercised."

First National Bank of Red Oak v. *City of Emmetsburg*, (Ia. 1912) 138 N. W. 451, was brought to recover a balance due from the city under its contracts for the construction of sewers, which the city refused to pay on the theory that its contracts were illegal. The court commented on the general rule of law permitting the city to make contracts for such business purposes, saying:

"It is apparent, therefore, that cities are authorized by the statute itself to make contracts for the construction of sewers, where the cost thereof is to be paid from a general fund and not from special assessments, and the contracts thus authorized must, we think, relate to the business powers of the city as distinguished from its governmental powers. It seems to be correctly held generally that a city has two classes of powers, which have been stated as follows: 'A city has two

classes of power—the one legislative, public, governmental, in the exercise of which it is the sovereignty and governs its people; the other, proprietary, *quasi*-private, conferred upon it, not for the purpose of governing its people, but for the private advantage of the inhabitants of the city itself as a legal personality. In the exercise of the powers of the former class, it is governed by the rule here invoked. In their exercise it is ruling its people and is bound to transmit its powers of government to its successive sets of officers unimpaired. But in the exercise of the powers of the latter class it is controlled by no such rule, because it is acting and contracting for the private benefit of itself and inhabitants, and it may exercise the business powers conferred upon it in the same way, and in their exercise it is to be governed by the same rules that govern a private individual or corporation'."

The court then said that the city should be required to live up to its contract, just the same as an individual would be required to, and said:

"Whatever may have been the rights of the property owners who were specially assessed for this improvement, we think it clear that the city should be held to the same business integrity that the law requires of any other corporation, or of an individual, and that the rules of estoppel and waiver should be applied to their business dealings as completely and as effectively as to other business transactions. There is, in our opinion, no legal reason, and there certainly is no moral one, whereby a municipal corporation should be permitted to reap the benefit of a fully completed contract and escape liability therefor under the plea of *ultra vires*, where the power exists to contract, but the same has been exercised in a negligent manner and even so irregularly as to release non-contracting parties from liability. That a city may be estopped under such circumstances, is well settled by our own decisions."

The court cited as an additional reason for upholding the contract that it represented a compromise and an accord and satisfaction, and said:

> "Furthermore, it is conclusively shown that there was a compromise and an accord and satisfaction, and this was as binding on the defendant city as would have been the case had plaintiff been dealing with a private corporation or individual."

(d) *Contract is a business contract.*

This contract Ordinance No. 74 is a business contract by which the City secured for its citizens that which they did not have before, and acquired by contract the right of way for street crossing purposes in consideration for which it agreed to pay for the constructing of the crossings, or a portion thereof.

In section 603, volume 1, Elliott on Contracts, it is said:

> "In contracting for the construction or purchase of waterworks to supply itself and its inhabitants with water, a city is not exercising governmental or legislative, but is using its business or proprietary powers. The purpose of such a contract is not to govern its inhabitants, but to obtain a private benefit for the city and for its denizens."

As above stated, this Ordinance contract is a business contract, and not a legislative one, and the City should now be held to be estopped from claiming that it was not authorized to make such a contract, particularly as it has thereby secured several of the crossings and the contribution of the Railway Company to the construction thereof, and a waiver of damages on the part of the Railway Company, and the parties cannot now be put in the same posi-

tion they were in before the contract was entered into. See Elliott on Contracts, Vol. 1, section 615, reading in part as follows:

> "As a general rule municipal corporations may be estopped by their own act in the exercise of their business powers much the same as any other person or corporation. A municipal corporation may be estopped to deny the validity of a contract as against an innocent party when it has retained the benefit of such contract, it being invalid, not because of want of power on the part of the municipality, but because such power was improperly exercised."

In *City of Tulsa* v. *Oklahoma Natural Gas Co.*, United States Court for the Eastern District of Oklahoma, 4 Fed. (2d series) 399, it was held that a city of the old Indian Territory under Arkansas laws then in force, in making a contract with a gas company, including provisions for lighting its streets, was acting in a business and not a governmental capacity. The reporter's syllabus No. 1, in accord with the opinion, is as follows:

> "Under Mansf. Dig., Ark., Sec. 749, 754, 755, by Act Cong., May 2, 1890, extending to the Indian Territory, and providing that cities and towns shall have power to contract, to provide for lighting streets, to authorize the construction of gas works, and to contract with any person or company to construct and operate the same, with the exclusive privilege of using the streets and alleys for an agreed time for such purpose, as such provisions have been construed by the Supreme Court of Arkansas and the Court of Appeals of Indian Territory, which decisions are persuasive if not binding on a federal court, a city in making a contract with a gas company was acting in its proprietary or business, and not in its governmental, capacity."

See also the decision of this court in *Los Angeles* v. *Los Angeles Gas & Electric Corporation,* 251 U. S. 32, 64 L. ed. 121, which is to like effect.

(e) *The contract is not ultra vires and the City cannot now be heard to so contend.*

Neither should the city at this late date be heard to say that this old contract Ordinance No. 74 is *ultra vires* and void. This court has well said that the rule of *ultra vires* ought to be reasonably and not unreasonably understood and applied, and not to abrogate contracts reasonably within the power of municipalities to make. See *Atlas Life Insurance Co.* v. *Board of Education of the City of Tulsa,* (not officially reported) 200 Pac. 171. The opinion by Mr. Justice KANE shows that this was an action for specific performance of a contract represented by a 99-year lease executed by the board of education of the city and assigned to the insurance company covering certain premises described therein, and in upholding the lease contract, the court said:

> "Finally, we are strongly of the opinion that the rule of *ultra vires* ought to be reasonably and not unreasonably understood and applied, and that whatever may fairly be regarded as incidental to and consequential upon those things which the legislature has authorized municipal corporations to do ought not, unless expressly prohibited, be held by judicial construction to be *ultra vires.*"

Hitchcock, et al., v. *City of Galveston,* 96 U. S. 341, 24 L. ed. 659, involved a contract of the city with plaintiffs for the construction of sidewalks and after the work was done and the city had received the benefits thereof, it sought to repudiate the contract as being *ultra vires,* but the court

held that the city had the authority to have the sidewalks constructed and to do whatever was necessary for the construction and not prohibited by law, and that it was bound by the contract and if the contract was irregular it had been ratified by the city. The court said:

> "It is contended, on behalf of the defendants, that the City of Galveston had no power given to it by law to make the contract which was made, or bind itself to pay with the bonds described, for sidewalk improvements. The contract was made on behalf of the city by the mayor and the chairman of the committee on streets and alleys, who had been authorized and directed by ordinance 'to enter into and make contract or contracts with proper and responsible parties to fill up, grade, curb, and pave the said sidewalks' (those designated in the ordinance and mentioned in the contract); and, as the petition of the plaintiffs averred, it was ratified and approved by the city council as the act and deed of the defendant. The authority of the council is found in the charter of the city. The 1st section of title 9, article 1, of the charter declares that the city council shall be invested with full power and authority to grade, shell, repair, pave or otherwise improve any avenue, street or alley, or any portion thereof within the limits of said city, whenever by a vote of two-thirds of the aldermen present they may deem such improvement to be for the public interest. And section 8, article 3, title 4, confers upon the city council power 'To establish, erect, construct, regulate and keep in repair, bridges, culverts and sewers, sidewalks and crossways, and to regulate the construction and use of the same;' and the section adds, that 'The cost of the construction of sidewalks shall be defrayed by the owners of the lot, or part of lot or block fronting on the sidewalk, and *the cost of any sidewalk constructed by the city shall be collected*, if necessary, by the sale of the lot, or part of the lot or block on which it fronts, together *with the cost of collection, in such a manner as the city council may by or-*

dinance provide; and a sale of any lot, or part of lot or block, to enforce collection of cost of sidewalks, shall convey a good title to purchaser,and the balance of the proceeds of sale, *after paying the amount due the city,* and cost of sale, shall be *paid by the city to the owner.'*

"The city is thus authorized itself to construct sidewalks and, though the cost of construction is to be defrayed by the abutting lot owners the city is to collect from them the cost and, in case of the sale of any lot made to enforce*d* the collection, the city is to pay to the owner the surplus of any proceeds of sale remaining after payment of the amount due to it. It is not to be denied that this section confers upon the city council plenary authority to construct the sidewalks and to do whatever is necessary for the construction, not prohibited by some other provision of law. The resort to the lot owners is to be after the work has been done, after the expense has been incurred, and it is to be for reimbursement to the city.

"And if the city council had lawful authority to construct the sidewalks, involved in it was the right to direct the mayor, and the chairman of the committee on streets and alleys, to make a contract on behalf of the city for doing the work. We spend no time in vindicating this proposition. It is true, the council could not delegate all the power conferred upon it by the legislature, but, like every other corporation, it could do its ministerial work by agents. Nothing more was done in this case. The council directed the pavements, ordering them to be constructed of one or the other of several materials, but giving to the owners of abutting lots the privilege of selecting which, and reserving to the chairman of their committee authority to select in case the lot owners failed. The council also directed how the preparatory work should be done. There was, therefore, no unlawful delegation of power. But, if there had been, the contract was ratified by the council after it was made."

Washington Water Power Co. v. *City of Spokane,* (Wash. 1916) 154 Pac. 329, involved a contract by which the land owner granted the city an easement for street purposes across its premises, the city to relieve it from the burden of sidewalks and paving and to bear that expense itself. The title to the land was finally acquired by the power company, plaintiff in the case, and the city sought to repudiate the contract by its being void, but the court commented on the fact that the city had the right to acquire the easement and, therefore, the right to accept the conditions, and referred to the Galveston case, *supra,* and said:

> "Under laws 1889-90, p. 219, Sec. 5, Subd. 6, the City of Spokane had power to purchase private property for corporate purposes, and we see no evil in making the compensation to be paid dependent on a future contingency. The city has accepted the benefits from the deed and is seeking to escape the burdens. As stated by Mr. Justice STRONG in *Hitchcock* v. *Galveston,* 96 U. S. 341, 24 L. ed. 659, the city 'having received benefits at the expense of the other contracting party, it cannot object that it was not empowered to perform what it promised in return, in the mode in which it promised to perform'."

(f) *Rights under the contract have vested.*

Vested rights and contract rights beneficial both to the City and to the Railway have attached to this old contract Ordinance No. 74; the Railway has given up its rights to damages in some instances and the City has participated in the expense of some of the crossings, as provided for in the contract, and the contract should not now be struck down, but should be protected by section 1 to the schedule of the Constitution of Oklahoma, providing that no existing rights,

contracts or claims shall be affected by the change in the form of government.

A vested right has been defined by this court in *Crump* v. *Guyer, et al.*, 60 Okl. 222, 157 Pac. 321, as follows:

> "But, a 'vested right' is the power to perform certain actions or to possess certain things lawfully, and is substantially a property right; and when it has been once conferred or become absolute by contract or existing laws, it is protected from invasion by the legislature, by those provisions in the Constitution which apply to such rights. In *State* v. *Julow*, 129 Mo. 163, 31 S. W. 781, 29 L. R. A. 257, 50 Am. St. Rep. 443, Justice SHERWOOD, in discussing this question, says that property is placed in the constitution in the same category with liberty and life. And 'where rights of property are admitted to exist, the legislature cannot say they shall exist no longer'; that if it were otherwise—'the constitution would then mean that no person shall be deprived of his property or rights unless the legislature shall pass a law to effectuate the wrong; and this would be throwing the restraint entirely away'."

In *Enid City Railway Company* v. *City of Enid*, 43 Okl. 778, 144 Pac. 617, this court held that the railway company had a vested contract right in the provision of its franchise ordinance limiting its liability as to street paving. The court said:

> "Under this section it cannot be doubted that the City of Enid was authorized to pass the ordinance in question. That such ordinance, when accepted by plaintiff in error, the terms and conditions thereof complied with, and the street railway lines constructed thereunder, constitutes a valid contract, must be admitted."

There is not only a moral obligation on the part of the city to continue to live up to the provisions of this contract

Ordinance No. 74, which has determined the rights of the City and the Railway for so many years, but it is also confidently insisted that in view of all the facts and the history of the past transactions under the Ordinance, the City should, as a legal proposition, be held to be firmly bound by the provisions of the Ordinance and no questions of police power should be allowed to enter into the matter except to confirm the contract, which is, in reality, in furtherance of the police power. Neither the order of the Corporation Commission nor the 1919 Act should be held to change or abrogate the provisions of this contract Ordinance, nor make it possible for the City to avoid its terms, thereby taking away the vested and contract rights of the parties thereto in violation of section 10, article 1 of the Constitution of the United States prohibiting the violation of the obligation of contracts In this connection the following quotations from sections 2725, 2729 and 2763 of Elliott on Contracts, volume 3, seem to be appropriate and worthy of great consideration:

> "*Sec. 2725.* The provision of the constitution against impairing obligations of contracts, does not apply to a statute in respect to contracts made after its passage. It is only those contracts in existence when the statute is enacted that are protected from its effect. No act of the legislature can alter the nature and legal effect of an existing contract to the prejudice of either party. The rule is that a statute affecting rights and liabilities should not be so construed as to act upon those already existing, and it is the result of the decisions that, although the words of the statute are so general and broad in their literal extent as to comprehend existing cases, they must yet be so construed as to be applicable only to such as may thereafter arise unless the intention to embrace all is clearly expressed.

To be invalid as impairing the obligation of contracts, a statute must be one enacted after the execution of the contract, the obligation of which is claimed to be impaired. * * *"

"*Sec. 2729.* The prohibition of the constitution against laws impairing the obligation of contracts applies to all contracts, executed and executory, whoever may be parties to them. This clause of the constitution is more generally invoked to protect executory contracts, but it applies equally to executed contracts. The legislature cannot arrest performance by impairing the obligation to perform, nor can it wait until after performance, and then by legislation undo and rescind the contract and restore parties to the rights transferred by the acts of performance. Neither party can undo what has been fully executed and completed, and the law therefore implies a contract that neither party will attempt to do so. * * *"

"*Sec. 2763.* The prohibition against the impairment of contracts is usually violated by any enactment which makes it possible for a county or municipality to evade liability on its valid obligations."

The provisions of the Commission's order which seek to declare invalid the contract Ordinance and to require the parties to attempt to agree on a division of the cost of the construction of the subway, ought, therefore, in all good conscience to be declared by this court to be null and void.

II.

The Oklahoma Statutes, as construed by the Supreme Court of Oklahoma, if intended to authorize the Corporation Commission to place burdens and obligations on plaintiffs in error in conflict with and contrary to contract Ordinance No. 74, are unconstitutional, depriving them of their property without due process of law and without compensation and denying them the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of United States and denying them the right of contract and impairing the obligation of contracts, in violation of section 10 of article I of the Constitution of the United States. ***(Specification of Error 4.)***

As has been shown by the foregoing argument in this brief, the parties to contract Ordinance No. 74 had a legal right to enter into it and it was for the mutual benefit of both parties and should be held to constitute a vested right which cannot now be impaired by subsequent legislation, either statutory or by orders of the Corporation Commission.

The same rule of law would apply to declare these statutory provisions invalid as applies as hereinabove set forth to declare the Corporation Commission order invalid, so far as it affects the old contract Ordinance No. 74 between the parties hereto.

Attention is again called to the decision in *Morgan's Louisiana, etc., R. Co.* v. *Louisiana Public Service Commission,* 287 Fed. 390, affirmed in *Louisiana Public Service Commission* v. *Morgan's Louisiana, etc., R. Co.,* 264 U. S. 393, 68 L. ed. 756, in support of the argument that even could legislation be legally enacted which would deprive the plaintiffs in error of their contract rights under Ordi-

nance No. 74, that the Oklahoma Statutes are not broad enough or definite enough to clearly show that the state has undertaken to authorize "a thing so manifestly unjust and oppressive."

The land grant act under which the Railway Company acquired its right-of-way and premises through McAlester and the Indian Territory contained no provision by which the Railway Company was obligated to construct public highway crossings over its premises or separate the grades thereof from that of its tracks, and the Arkansas Statutes *supra,* in force when contract Ordinance No. 74 was enacted, did not place such obligation on the Railway Company, and hence the city was not, at the time, in reality giving up any right it had in that particular in entering into the contract relied on herein, but was gaining the right to extend its streets over the railway premises, and hence, for this additional reason, it could not be said that the city, at the time it entered into the contract in question, was contracting away any of its existing police power.

It is respectfully submitted, therefore, that the decision of the Supreme Court of Oklahoma should be reversed and the cause remanded for dismissal, and the contract ordinance should be held valid.

Respectfully submitted,

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Attorneys for Plaintiffs in Error.

Dated January 9th, 1926.

No. 205

In the Supreme Court of the United States

October Term, 1925.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, AND UNITED STATES FIDELITY AND GUARANTY COMPANY, *Plaintiffs in Error,*

VERSUS

THE STATE OF OKLAHOMA AND THE CITY OF McALESTER, OKLAHOMA, *Defendants in Error.*

IN ERROR TO SUPREME COURT OF THE STATE OF OKLAHOMA.

REPLY BRIEF OF PLAINTIFFS IN ERROR.

JOSEPH M. BRYSON,
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ADDENDA.

Add immediately following the first paragraph at top of page 3 of this reply brief, the following:

This court has heretofore held that the denial by it of a petition for a writ of *certiorari* to review a judgment imports no expression of opinion upon the merits of the case.

—*United States* v. *Carver*, 260 U. S. 482, 67 L. ed. 361;

Hamilton Brown Shoe Co. v. *Wolf Brothers & Company*, 240 U. S. 251, 60 L. ed. 629.

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IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

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vs.

THE STATE OF OKLAHOMA AND THE CITY OF McALESTER, OKLAHOMA, *Defendants in Error.*

IN ERROR TO SUPREME COURT OF THE STATE OF OKLAHOMA.

REPLY BRIEF OF PLAINTIFFS IN ERROR.

Come now the plaintiffs in error and respectfully submit this their reply brief herein to the brief of defendants in error, and in reply to the suggestion, on page 1 of said brief, that the decision of this court of January 12, 1925 (Lawyers' Co-Operative Publishing Company's 69 Law. ed. 259), denying plaintiffs in error's petition for a writ of *certiorari*, is *res judicata* herein, plaintiffs in error respectfully show to this court that, as stated at page 4 of their first brief herein, the jurisdiction of this court by writ of error is invoked under the provisions of section 237 of the

Judicial Code, 36 Stat. 1156, as amended by Act of December 23, 1914, 38 Stat. 790; Act of September 6, 1916, 39 Stat. 726, and Act of February 17, 1922, 42 Stat. 366, the same being section 1214 of the West Publishing Company's United States Compiled Statutes, 1916, 1923 Supplement, Vol. 1, pages 327-328, reading in part as follows:

> "A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; *or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity,* may be re-examined and reversed or affirmed in the Supreme Court upon a *writ of error.* The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such state court, and may, in its discretion, award execution or remand the same to the court from which it was removed by the writ.
>
> * * * * * * * *
>
> "In any suit *involving the validity of a contract wherein it is claimed that a change in the rule of law or construction of statutes by the highest court of a state applicable to such contract would be repugnant to the Constitution of the United States, the Supreme Court shall, upon writ of error,* re-examine, reverse, or affirm the final judgment of the highest court of a state in which a decision in the suit could be had, *if said claim is made in said court at any time before said final judgment is entered and if the decision is against the claim so made.* (36 Stat. 1156, 38 Stat. 790, 39 Stat. 726, 42 Stat. 366.)"

The omitted portions of the above quoted statute are those providing for review by this court by *certiorari* of proceedings of state courts, and under which provision it was at the time deemed best by plaintiffs in error to also invoke the jurisdiction of this court by *certiorari*, as it did do, with the result that its petition was denied by this court as above mentioned, and plaintiffs in error understand that such denial was on the ground that the proper procedure was by writ of error, rather than by *certiorari*, and that this court's action in denying the *certiorari*, therefore, has no effect upon the merits of this proceeding, by writ of error.

The last paragraph of the above quoted statute was repealed by Act of Congress of February 13, 1925, c. 229, 43 Stat., section 14 of which act reads as follows:

> "*Section 14.* That this act shall take effect three months after its approval; but it shall not affect cases then pending in the Supreme Court, nor shall it affect the right to a review, or the mode or time for exercising the same, as respects any judgment or decree entered prior to the date when it takes effect."

The order of the Corporation Commission of Oklahoma involved herein was made on June 16, 1922 (R. 64-6); the opinion and judgment of the Supreme Court of Oklahoma, affirming said order, was rendered on December 11, 1923, 229 Pac. 172 (R. 69-77), and plaintiffs in error's petition to that court for a rehearing was overruled on September 30, 1924 (R. 94), and the record on review was filed in this court on November 17, 1924, so that as above stated, it is considered that this proceeding on review is covered by the above quoted statute.

Plaintiffs in error's contention therefore is that the result and effect of the order of the Commission and the decision of the Supreme Court of Oklahoma, is to hold invalid and of no force or effect the contract provisions of Ordinance No. 74, and to hold that regardless of that contract, the 1919 statute of Oklahoma gives the Corporation Commission full power and jurisdiction to make the order complained of, requiring the Railway Company to prepare and file plans and estimates of cost and to endeavor to agree anew with the City on a division of the cost, and on failure to do so, to agree to submit the question of division of the cost to the Corporation Commission. It is the contention of plaintiffs in error that these questions are properly reviewable on writ of error by this court under the above quoted section 237 of the Judicial Code, as amended, and that this question has been settled by the decisions referred to and quoted from at pages 4 and 5 of their first brief herein, it clearly appearing that there has been drawn in question the validity of the Oklahoma statute and Corporation Commission's order, and the authority exercised under the State of Oklahoma on the ground of their being repugnant to the Constitution and laws of the United States, in that they result in the taking of the Railway Company's property without due process of law and without compensation and deny to it the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States and deny them the right of contract, and impair the obligation of contracts in violation of section 10, article 1, of the Constitution of the United States, and the decision is in favor of the validity of the statute, order and authority; and also that the suit involves the validity of the old contract Ordinance No. 74 in that it is claimed that a change

in the rule of law or construction of statutes by the Supreme Court of Oklahoma applicable to the contract would be and is repugnant to the Constitution of the United States, being the Fourteenth Amendment, and section 10, article 1, of the Constitution of the United States, as above mentioned, and the decision is against the claim so made.

In answer to the discussion at pages 4 to 13, under subhead 1 of the defendants in error's brief, reading as follows:

> "No valid contract exists, regardless of questions of police power, under City Ordinance No. 74, to the effect that Comanche Avenue shall never be opened except upon payment by the City of McAlester of the entire cost of the crossing.",

it is deemed sufficient to say that the argument advanced is not sound and defendants in error cannot be heard to say that they ratified and only intended to ratify a part of the old contract Ordinance No. 74, but are not bound by the remaining parts which are not so pleasing to them, and their contention that the ordinance contract is separable into parts so that they may retain the benefits of some parts and reject the burdens of others, is untenable. The very title of the ordinance shows what the entire ordinance is intended to cover, and that in all of its parts it refers to and depends on others of its parts, and the considerations for the mutual undertakings and agreements are shown throughout the ordinance to bear on and support each covenant and agreement. The title reads as follows:

> "An ordinance to provide for street crossings across the right-of-way, station grounds and tracks of the Missouri, Kansas & Texas Railway Company, in the City of South McAlester, upon the lines of certain streets as laid out by the Townsite Commission's sur-

veys in lieu of other crossings now in use, and which, upon completion of the new crossings herein provided for, shall be vacated and closed; and for other purposes." (R. 48.)

The contract is executed in part and is executory in part. It must be construed in accordance with the general law as a whole and as an entirety, rather than to pick out portions and construe them without regard to other portions, and the intent of the parties must be gleaned from the entire contract. See Elliott on Contracts, Vol. 2, Sec. 1514, reading as follows:

> "The actual contract of the parties must be deduced from the entire agreement and from all its provisions considered together, and not from specific provisions or fragmentary parts of the instrument, because the intention of the parties is not expressed by any single part or provision of the agreement, but by every part and term so construed, if possible, as to be consistent with every other part and with the entire agreement, since the parties could not have intended apparently conflicting clauses in a contradictory sense. Effect must be given to all the provisions and parts of the contract where possible and no part should be rejected unless absolutely repugnant to the general intent. A single word or sentence should not be construed alone, but should be considered with reference to the context."

See, also, section 1515, Elliott, *supra*, reading in part as follows:

> "In the interpretation of any particular clause of a contract, the court is required to examine the entire contract, and may also consider the relations of the parties, their connection with the subject-matter of the contract, and the circumstances under which it was made. The construction should make the whole consis-

> tent, giving all parts their due weight. Force and effect should be given to all the words employed by the parties where that is possible. And one part of the agreement may be resorted to to explain the meaning of the language or expressions of another part when both relate to the same subject-matter."

See, also, section 1519, Elliott, *supra*, reading in part as follows:

> "There should be a proper regard for the object which the parties had in entering into the contract as well as the language employed in arriving at its proper construction. Inquiry may be made as to their situation at the time the contract was entered into, and the purpose to be accomplished by its execution."

The mere fact that there is a proviso, as quoted at page 28 of plaintiffs in error's brief, giving the Railway Company a right to contest the opening of additional streets, does not nullify its otherwise valid provisions, but on the contrary completely refutes the claim made at pages 19-20 of defendants in error's brief under the heading:

> "The provisions of the ordinance regarding future damages oust the jurisdiction of the courts and are void.",

because the above mentioned proviso in the ordinance specifically retains the right of litigation to determine the necessity for any additional street and the ordinance simply provides that if additional streets, or, in this instance, Comanche Avenue, should be opened, then the terms thereof are fixed, in that the Railway Company agrees to waive its right to damages for its property taken for the street, in consideration of which the City agrees to bear the cost of the construction of the crossing.

Answering the argument of defendants in error at pages 14 and 15 of their brief, under the heading:

"Section 9 void because unlimited as to time.",

by which they refer to section 9 of contract Ordinance No. 74 and contend that the entire contract is void because there is no specified time for complying therewith; it is submitted that the Oklahoma cases cited in that argument are not in point for the reason that it clearly appears from the very wording of the contract Ordinance No. 74 that it was intended to be a perpetual contract, binding both parties and their successors for all time, and in that respect it is in a class similar to the contract construed in *Western Union Telegraph Co.* v. *Pennsylvania Company*, (C. C. A. 3rd Cir.) 129 Fed. 849, which was a contract between a railroad company and a telegraph company providing for the construction, maintenance and operation of a telegraph line on the railroad right-of-way, by which each party was to concede certain rights and to perform certain conditions, and it was held to be one of those classes of contracts which by its terms is shown to be intended to be permanent, and neither party therefore had the right to arbitrarily and at any time terminate it. The following quotations are from that opinion:

> "We think it will sufficiently appear, from a careful consideration of the contract, with its modifications, as set forth in the bill, the circumstances attending its origin, the purposes had in view, and the conduct of the parties throughout the long period during which those purposes seem to have been accomplished, that there was no intention entertained by the parties to the contract, to limit its duration, or confer upon either party, without the consent of the other, the right of revocation. If a contract is not revocable at the will of either

party, or otherwise limited as to its duration, by its express terms, or by the inherent nature of the contract itself, with reference to its subject-matter or its parties, it is presumably intended to be permanent and perpetual in the obligation it imposes. That the life of a contract should depend on the mere will of either party thereto, without the consent of the other, is a limitation so important and drastic that it is hard to conceive why, if the parties intended it, they should not express that intention in the contract itself. * * * The essential nature of the service is such as to indicate that permanency in contractual relations was intended by the contract under which these parties have lived for nearly half a century. We certainly find nothing in the character of the relation established between these parties so long ago, as would indicate that it was terminable at the will of either party, without the consent of the other. If a power of revocation was intended by the parties to this contract, it would seem the natural and logical course, that such power should have been expressly incorporated in the contract itself. Apart from those contracts, which, from their inherent nature, imply a power of revocation, it would seem that the intention of parties to an agreement, that it should be perpetual and without limit as to duration, could not be more properly expressed than by silence as to any time limit, or power of revocation. Reason and authority would seem to concur in support of this doctrine, and we find no direct and controlling authority to controvert it. The reasoning of the court below has apparently been on a contrary presumption, that is, that every written contract, vesting no interest in realty, and silent as to the time or method of its duration, is to be presumed revocable at the will of either party, upon reasonable notice." (l. c., pp. 861-862.)

Answering that part of defendants in error's argument at page 16 of their brief, reading:

"Section 9 of ordinance void because extending beyond the term of municipal officers.",

attention is again called to the fact that, as is contended in plaintiffs in error's brief at pages 44-6, the contract ordinance is a business contract and not a governmental one, and for that reason is shown by the authorities cited by defedants in error not to be controlled by those authorities.

Answering the argument of defendants in error at pages 16 to 19 of their brief, under the heading:

"Material portions of ordinance void because of penalties provided.",

it is respectfully submitted that the argument and authorities submitted are not in point and defendants in error have entirely misconceived the meaning of the terms liquidated damages and penalties, in that they seek to apply such terms to the amounts mentioned in the contract ordinance as being the sums of money to be paid in the specific performance of the contract, whereas those terms liquidated damages and penalties are only properly applied to provisions in contracts for declaring some sort of forfeiture or sum to be paid in the event of a breach or failure to perform the contract, all of which is more clearly shown by the following quotation from chapter L, Secs. 2125-26, of Elliott on Contracts, Vol 3:

"Sec. 2125. *Liquidated Damages.*—Liquidated damages are those the amount of which has been determined by an anticipatory agreement between the parties. Where the amount is reasonable, and not disproportionate to the injury provided against, the injured party will not be allowed to recover more than the sum fixed and he will be regarded as having been injured to the extent of the amount stipulated, especial-

ly where the damages are incapable of exact computation. If the amount fixed is greatly disproportionate or unconscionable it will be construed a penalty and not liquidated damages, and hence, not recoverable, for the compensation is the basic rule of the law of damages. 'A stipulation on the subject of damages differs from a penalty in this,' says one authority, 'that the parties are holden by it; whereas, a penalty is regarded as a forfeiture, from which the defaulting party can be relieved'."

"SEC. 2126. *Liquidated Damages—How Distinguished From Penalty.*—No positive rules can be deduced from the cases as an absolute guide in all instances to determine whether a contract providing for a stipulated sum for its breach is to be regarded as a penalty or liquidated damages."

Referring to defendants in error's argument beginning at page 21 of their brief under sub-head No. 2, reading as follows:

"Even if the city ordinance be viewed as a contract such as alleged, such contract is void because beyond the power of the city to make and is a surrender to the police power.",

and to the decision of this court in *New York, etc., R. Co. v. Bristol*, 151 U. S. 556, 38 L. ed. 269, quoted from on page 21 of said brief, it is submitted that the case is not in point here, for the reason that as appears from the opinion of this court therein, the railroad was a domestic corporation of the state in which the cause of action arose and the state had the power, as it did do, by subsequent legislation, to amend the corporation's charter, so as to place additional burdens on it regarding construction of highway crossings over its premises. Such was not the situation in the case at bar, where plaintiff in error Railway Company is and was

a corporation organized and existing under the laws of Kansas, and operating lines of railroad through the old Indian Territory and the City of South McAlester, now McAlester, over which country certain parts of the statutes of Arkansas, so far as applicable, as contained in Mansfield's Digest of 1884, were put in force, but no power in Indian Territory or Oklahoma could alter or amend the charter of the Railway Company.

The cases cited at page 26 of defendants in error's brief are not applicable, as they relate solely to the question of the liabilities of the railroad companies for payment of paving assessments for paving and improving existing streets across or abutting their premises.

The case of *Galveston Wharf Co.* v. *City of Galveston*, 26 U. S. 473, 67 L. ed. 355, quoted from at pages 27-8 of defendants in error's brief, is not in point, as it appears in that case there was some sort of contract under which it was claimed the city was prohibited from exercising the right of eminent domain, whereas in the case at bar, the contract is not prohibitory of but is in furtherance of the exercise of the right of eminent domain, in that the amount of damages has been agreed on between the parties in advance, and also, as pointed out in plaintiffs in error's first brief herein, said contract is in furtherance of the police power in that provision is made for construction of the crossings when legally established.

The case of *Northern Pacific R. Co.* v. *Minnesota, ex rel. Duluth*, 208 U. S. 583, 52 L. ed. 630, at pages 28-30 of defendants in error's brief, and that of *Chicago, B. & Q. R. Co.* v. *Nebraska, ex rel. Omaha*, 170 U. S. 57, 42 L. ed. 948, pages 31-4 of defendants in error's brief, are not applicable

for the reason that in the *Duluth* case, *supra,* there was a provision in the charter of the railway company, as well as a common law duty, requiring the railway company to construct the viaduct at the time the contract was entered into, which is not the case here; and in the *Omaha* case, *supra,* there was a pre-existing statutory duty of the railroad company to construct the viaduct, which was not the situation in this case.

The case of *Contributors to the Pennsylvania Hospital* v. *City of Philadelphia,* 245 U. S. 20, 62 L. ed. 124, pages 34-6 of defendants in error's brief, and *Cincinnati* v. *L. & N. R Co.,* 223 U. S. 390, 56 L. ed. 481, pp. 56-7, are similar to the *Galveston* case, *supra,* in that the contracts involved purported to prevent the exercise of the right of eminent domain, whereas the contract in controversy here is in furtherance of the exercise of that right.

The case of *Georgia* v. *Chattanooga,* 264 U. S. 472, 68 L. ed. 796, has no application, as that was simply a question of one of the sovereign states, in its private capacity, owning land in another state and not being allowed, under those conditions, to claim any sovereign immunity against the power of eminent domain.

The case of *Minnesota, ex rel. St. Paul,* v. *Minnesota Transfer Railway Co.,* 50 L. R. A. 656, pages 37-40 of defendants in error's brief, is not in point, as it appears from the opinion that the city undertook to contract without any consideration whatever, but as a gratuity, to give away its *existing* right to compel the railway company to maintain *existing* street crossings, which is not the case here, for the reason that Comanche Avenue was not and is not now an *existing* street crossing, and at the time the ordinance con-

tract was entered into there was no statutory authority by which the city could require the railroad company to construct or maintain a crossing. While the Arkansas statutes applicable to railroad corporations were not extended over the Indian Territory, it is interesting to note that the Supreme Court of that state, in *Prairie Company* v. *Fink*, (1898) 65 Ark. 492, 47 S. W. 301, held that under the Arkansas statutes then in force as referred to in that decision, requiring railroads which should construct their roads over highways to also construct street crossings in a certain manner, did not apply where the highway was constructed after the railroad was built. There are decisions to the effect that in the absence of statutory authority, a railroad company cannot be required to construct separate grade crossings over its premises at its own expense. Notes in 28 L. R. A. (N. S.) 300; Notes in L. R. A. 1915E, 788; *L. & N. R. Co.* v. *Hopkins County*, (Ky.) 156 S. W. 379.

The case of *Cincinnati* v. *L. & N. R. Co.*, 223 U. S. 390, 56 L. ed. 481, page 56 of defendants in error's brief, is not in point, for it is similar to the *Galveston* case, *supra*, and the *Philadelphia* case, *supra*, in that it was contended that the right of eminent domain was being exercised in violation of the contract.

Respectfully submitted,

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Dated February 23rd, 1926.

[redacted]

New No. 205.

In the Supreme Court of the United States

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, AND UNITED STATES FIDELITY AND GUARANTY COMPANY, PLAINTIFFS IN ERROR,

VS.

THE STATE OF OKLAHOMA AND THE CITY OF McALESTER, OKLAHOMA, DEFENDANTS IN ERROR.

BRIEF OF DEFENDANTS IN ERROR.

WILLIAM J. HORTON,
City Attorney, City of McAlester,

E. S. RATLIFF,
Attorney, State Corporation Commission, Oklahoma,

JACKMAN A. GILL,
Attorneys for Defendants in Error.

ERRATA:

Page

3 Line 21-21 should read:
"contention is made of indefiniteness in the language of the statute, and that there is doubt that the power has been explicitly given the Corporation Commission to make the order, as was the case in Louisiana."

4 Line 6, "no" for "on."

11 Line 23, "ascertainable" for "ascertaining."

21 Line 22, "capable" for "incapable."

31 Line 8, "Subsequently" for "Consequently."

46 Line 20, "contract" for "court."

50 Line 18, "a material" for "the material."

53 Line 12, "therefore" for "therefor."

55 Line 11, "take and hold" for "taking and holding."

58 Line 19, "subjoined" for "joined."

62 Line 12, "deficient" for "difficient."

62 Bottom lines, "judgment" for "judgement."

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No. 729.

New No. 205.

In the Supreme Court of the United States

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VS.

THE STATE OF OKLAHOMA AND THE CITY OF McALESTER, OKLAHOMA, DEFENDANTS IN ERROR.

JURISDICTION.

This cause was before this court upon the petition of plaintiffs in error for a writ of certiorari to the Supreme Court of Oklahoma at the October term, 1924, and the writ was denied January 12, 1925.

M. K. & T. Ry. Co. et al. v. *State of Oklahoma et al.*, (No. 729) .... U. S. ...., 69 L. Ed. 259 (Mem. Cas.).

If the writ of certiorari was denied not on the ground that it was not the appropriate remedy, but upon consideration of the merits, we would suggest that the question presented on the writ of error is *res judicata*.

The judgment of the Supreme Court of Oklahoma is final to the extent that it affirms the order of the Corporation Commission of Oklahoma though it is to be noted that the Supreme Court of Oklahoma expressly states that it cannot be enforced until a compensation for the right of way is made to the railway company either by amicable agreement or by condemnation proceedings—a matter which will ultimately depend upon the decision of this court of the question presented on this appeal.

STATEMENT OF QUESTION INVOLVED.

The plaintiffs in error set out four specifications of error but these are all plainly resolvable into the single proposition that because of city Ordinance No. 74 (R. 48-52), no part of the expense of the underpass crossing at Comanche Avenue can lawfully be assessed by the Corporation Commission of Oklahoma under the applicable provisions of the Oklahoma Statute for the reason that said ordinance constitutes a contract between the city and the railway company, that in case such a crossing is ever constructed it shall be at the sole expense of the city, and that, in consequence, the order of the Corporation Commission and the judgment of the Supreme Court of Oklahoma, affirming such order, is an impairment of such contract, giving this court jurisdiction to review the judgment. We do not understand that the plaintiffs in error question the general validity of the Oklahoma Statute under which the Corporation Commission of that state ordered the railway company to construct the crossing and to sustain a portion of the expense, except that a contention is made of ~~any~~ indefiniteness in the language of the statute, and that there is ~~any~~ doubt that the power has been explicitly given the Corporation Commission to make the order, as was the case in *Louisiana Public Service Commission* v. *Morgan's Louisiana & Texas Railroad and Steamship Co.*, 264 U. S. 393, 68

L. Ed. 756, but principally to contend that the exercise of such power impairs the obligation of the alleged contract in Ordinance No. 74.

Upon this question it is the contention of the defendants in error, first, that independently of all questions of the police power on legal contract is to be found in Ordinance No. 74 such as claimed by plaintiffs in error; and second, that if this court shall construe the ordinance as making such contract, then such contract as it affects Comanche Avenue is void because in contravention of the police power.

I.

No valid contract exists, regardless of questions of police power, under City Ordinance No. 74, to the effect that Comanche Avenue shall never be opened except upon payment by the City of McAlester of the entire cost of the crossing.

In the construction of the ordinance to determine whether such contract has been made, it is material to take into consideration the existing facts and situation leading to the passage of the ordinance, including also those material facts subsequently occurring which should properly be taken into consideration in arriving at its correct interpretation.

The record shows that the ordinance itself was enacted by the City of *South* McAlester, whereas all of the proceedings exhibited by the record, including the title of this cause, are in the name of the "City of McAlester," and the present or existing municipality, known as the City of McAlester, is recognized and

treated throughout as the successor in interest and party to the alleged contract contained in Ordinance No. 74. The record shows that the City of McAlester consists of six wards. That the Missouri, Kansas & Texas Railway line traverses the entire extent of the city from the north to south, the First, Second and Sixth Wards of the city lying on its east and the Third, Fourth and Fifth Wards on its west, the railway thus bisecting the city geographically (R. 15-16). The Chicago, Rock Island and Pacific Railway passes through the city accomplishing a similar division of the city into wards, the Second and Third Wards lying upon its south and the First and Fourth Wards upon its north, and contiguous thereto but not in physical contact with the Fifth and Sixth Wards, which adjoin and lie north of the First and Fourth Wards and which (the Fifth and Sixth) at the time of the passage of Ordinance No. 74 composed what was then known as the Town of McAlester, Indian Territory (R. 16), the two municipalities having been later consolidated as a city of the first class under the name of the City of McAlester (R. 16), under Act of Congress of March 29, 1906, 34 Stat. 91, said Act being as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act of consolidation adopted by the City of South McAlester and the Town of McAlester, in the Indian Territory, is approved, and that the City of McAlester is hereby created a city of the first class in the Indian Territory, with legal succession to all public property now belonging to the incorporated City

of South McAlester and the Town of McAlester, and said City of McAlester shall have power to exercise municipal jurisdiction over the area of territory embraced in and platted as the town sites of South McAlester and McAlester by the Choctaw Town Site Commission, according to act of June twenty-eighth, eighteen hundred and ninety-eight, and subsequently.

Sec. 2. That all indebtedness due by either of said municipalities at the date of passage of this bill shall become the debt of the City of McAlester.

Sec. 3. That the present city government of the City of South McAlester shall exercise all municipal powers over the City of McAlester created by this act until their successors are elected and qualified in accordance with existing law, and that at the municipal election held on the first Tuesday in April, nineteen hundred and six, there shall be elected from the territory heretofore known as McAlester four additional members of the city council of the City of McAlester created by this act.

Approved, March 29, 1906."

That the Missouri, Kansas & Texas Railway Company was constructed in the '70's (R. 14) under a grant of right of way through Indian Territory by Act of Congress of July 25, 1866, 14 Stat. 36, and before the City of South McAlester, Indian Territory, or the Town of McAlester, Indian Territory, were laid out as townsites under Act of Congress of June 28, 1898; that in platting the towns the streets were brought up to the railway right of way on each side but not projected across the spaces in the company's right of way, being reserved to the railway company as acreage and amounting in the City of South McAlester, as

shown by the official plats introduced in evidence, to 52.69 acres; and that no right of way for any streets across the railway company's right of way had been acquired by condemnation proceedings or purchase at the time Ordinance No. 74 was passed.

Already, however, as shown by the ordinance itself, a number of crossings were in use by the public, the number and location of which are not shown (except crossings in block 351 between Grand Avenue and Choctaw Avenue) with which promiscuous and unauthorized crossings the railway company was evidently (and properly) dissatisfied, resulting in the passage of Ordinance No. 74.

It will be further helpful to note that that portion of the railway separating the Second and Third Wards for several thousand feet south of the depot at its junction with the C. R. I. & P. Ry. Co., was on a very high embankment, necessitating underpass crossings wherever opened and that one crossing existed in this portion being at Delaware Avenue where a subway crossing already existed through which ran "the town branch" at which the bridge No. ..... of the railway company was located. The leading scope of the ordinance is made apparent from its title which is as follows:

> "An Ordinance to provide for street crossings across the right of way, station grounds and tracks of the Missouri, Kansas & Texas Railway Company, in the City of South McAlester, upon the lines of certain streets as laid out by the Townsite Commission's surveys in lieu of other cross-

ings now in use, and which, upon completion of the new crossings herein provided for, shall be vacated and closed; and for other purposes:

Be it ordained by the council of the City of South McAlester:"

It is observable from the ordinance that the chief and main points dealt with as affecting the existing conditions and adjusting the present needs and requirements of the city, in its then size and population, and the rights and objections of the railway company as to crossings, were comparatively simple, being as follows: The railway company agreed to four crossings, two grade plank crossings at Monroe and Miami Avenues to be constructed by the company at its expense; an overhead bridge crossing at Grand Avenue and an underpass at Delaware Avenue, the expense of the Grand Avenue and Delaware crossings to be equally borne, the railway, however, to advance the costs and to be reimbursed out of future tax levies made by the city. There was an alternate provision that at any time after five years an underpass crossing might be opened at Cherokee Avenue upon an agreed division of the costs, upon condition that the crossing at Delaware Avenue in that event be closed, or else the city might construct an underpass at Cherokee before five years at its own expense.

The express consideration of the railway company for granting these four crossings at Monroe, Miami, Grand and Delaware Avenues, and its contribution to the expense, is contained in Section 5:

"Section 5. * * * the city hereby agrees to vacate and forever close the present grade crossing over the railway company's tracks at or near the alley shown on the townsite commission's map, and lying between Grand Avenue and Choctaw Avenue, and extending through Block Number three hundred and fifty-one (351), and also to vacate and close all other crossings over said railway company's tracks, except those herein provided for, and upon the completion of said crossings herein provided for, all other crossings, including the present grade crossings between Grand Avenue and Choctaw Avenue, shall be and hereby are vacated and closed; and the city further agrees that it will hereafter open no other street crossings or alleyways over, across or under the right of way, station grounds and tracks of the said railway company, except and provided it shall pay to the said railway company, as agreed stipulated and liquidated damages in any proceedings instituted by the said city for the opening or condemnation of a right of way over, across or under the right of way, station grounds and tracks of the said railway company, any judgment, finding, verdict or assessment of damages of any court, jury, commission or other tribunal at the time having authority to assess said damages to the contrary notwithstanding, and whether for more or less than the agree.... sum, namely:

Should Choctaw Avenue be opened over, across or under the right of way, tracks and station grounds of the railway company, the city shall pay the said railway company as agreed, stipulated and liquidated damages, in the sum of twenty thousand dollars ($20,000.00).

Should any other crossing, alley way or street be opened across the railway company's premises through block number three hundred and fifty-one (351), the city shall pay to the railway com-

pany, as agreed, stipulated and liquidated damages —the sum of fifteen thousand dollars ($15,000.00).

Should any other street or alley way except Washington Avenue or Comanche Avenue, be opened across, over or under the right of way, station grounds, and tracks of the railway company, the city shall pay to the said railway company as agreed, stipulated and liquidated damages, the sum of ten thousand dollars ($10,000.00) for each and every other of said crossings, and in addition thereto damages equal to the actual value of any buildings or other improvements of the railway company damaged or destroyed by the opening of any street or crossing; provided that nothing herein contained shall constitute a waiver on the part of the railway company to contest the opening of any additional streets other than those herein provided for."

The only immediate, definite, tangible agreement arising from this ordinance and based upon any present consideration was that part found in Sections 1 to 8 relating to the establishment of the crossings enumerated and the closing of all other crossings "then in use." As to whether or not even this part of the agreement was valid or enforcible by either party, had performance been refused, is not material here to inquire as such portion of the agreement was performed, the "other crossings then in use" presumably were closed, the grade crossings at Monroe and Miami Avenues put in, and the Grand Avenue bridge and Delaware crossing and also, subsequently, the Cherokee crossing were completed, and the city's part of the cost repaid in taxes as shown by resolutions of the "City of McAlester" of April 23, 1909

(subsequent to the consolidation of the two municipalities), being plaintiffs in error's Exhibits "1, 2, 3 and 4" (R. 45-48), and being resolutions for the payment of the expense originally assumed by the City of South McAlester and also by the amicable suit in the Superior Court of Pittsburg County, Oklahoma, by the *Missouri, Kansas & Texas Railway Company as plaintiff* v. *the "City of McAlester," defendant* (defendants' Exhibit 6, R. 53-64), for the recovery of the city's proportion of the expense incurred in the construction of the crossings, the expense as set out being as follows (R. 54):

"Delaware Avenue. . . . . .$ 131.30
Grand Avenue. 11036.08
Cherokee Avenue. 8009.05

Total. . . . . .$19,176.43"

of which the city's share was $9,333.69.

It is this performance of this part of the ordinance and this alone which is meant by the insistence made in the brief of the plaintiffs in error that the city has continually ratified the contract. The part of the agreement relating to these particular crossings and the closing of other crossings then in use was the only definite, certain, ~~ascertaining~~ ascertainable portion of the agreement and this part has been performed and no question exists as to it.

Now, then, with reference to the provision as to Comanche Avenue which is contained in Section 9 (R. 51) it is our contention that there is no contract at all, nor any consideration for a contract, and neither, in-

cidentally, is there any contract as to the other crossings which might thereafter be opened, such as Choctaw Avenue or in Block 351 or the other miscellaneous crossings which might thereafter be desired by the city. There are certain conditions laid down as to the crossings at Choctaw Avenue or other streets such as the payment of certain arbitrary amounts and as to Comanche Avenue certain requirements as to the kind of crossing, plans, specifications and expense, but there is no fixed right in the city to have the crossing opened at Comanche Avenue or at any other crossing even upon payment or tender of payment of the stipulated liquidated damages or performance or tender of performance of any and all the things and conditions mentioned, for it is made essential in each case that condemnation proceedings be instituted and the right to oppose the opening of the crossings is specifically reserved to the railway company. This is conceded by plaintiffs in error in their brief at page 29 where they say:

> "It will therefore be seen that while the railway reserves the right to contest the opening of Comanche Avenue, yet if it should ever be legally opened, then the construction of same should be by an undergrade crossing * * * at the sole cost and expense of the city * * *."

Now it is too manifest for argument that if the right to oppose the crossing is reserved there is no unconditional grant of the right to the crossing. It is immaterial whether there be an exercise of the right to oppose the crossing; the right to have the crossing open-

ed upon performance by the city must exist as an actual right in the contract itself, independent of any option to oppose the crossing. The opposition may prove successful and in such event the city fails to get the crossing. Observe the plaintiffs in error say "yet if it should ever be legally opened," etc., that is, opened by law in adverse legal proceedings. But if opened by law, then it is not opened by contract. It is manifest that the city neither obtained then or has now any *contract right* to the crossing upon offer or payment of all of the expense, but merely a right to resort to condemnation proceedings to force the opening, with the added burden that in case it is adjudged in such proceedings that there is a public necessity for the crossing and that the same is necessary for the protection and the safety of the citizens and the development of the city, it may then secure the crossing upon payment of the entire cost thereof, and this without regard to what the law might then be with regard to the assessment of expense or the then respective rights, duties and obligations of the parties; thus giving to the one party the right to comply or refuse compliance according to what may then appear to be to its advantage or disadvantage. Could it be said that an agreement in words which vests in the one party no certain right to demand and receive performance; which is so optional as to the one party, so unilateral in character and so devoid of consideration, contains any of the elements of a true contract, or is indeed a contract at all?

Section 9 void because unlimited as to time.

Again: If the court should be of opinion that such a contract is contained within the terms of the ordinance, then such contract, being without duration as to time, may be terminated by either party at any time. In applying this well known principle, the court, in *Arkansas Valley Town & Land Co.* v. *Atchison, T. & S. F. Ry. Co.*, 49 Okla. 282, 151 Pac. 1028, 1032, said:

> "The contract, however, does not by its terms fix any period of duration between the parties, and its duration is indefinite, so that we are unable to determine just how long the parties contemplated that it should continue. This being true, it might be terminated by either party at any time. *Smith* v. *Cedar Falls & Minn. Ry. Co.*, 30 Iowa 244; *Lawrence* v. *Robinson*, 4 Colo. 567; *Davis* v. *Fidelity Fire Ins. Co. of Baltimore*, 208 Ill. 375, 70 N. E. 359; *Dunham* v. *Orange Lumber Co.*, (Tex. Civ. App.) 125 S. W. 89; *Joliet Bottle Co.* v. *Joliet Cit. Brewing Co.*, 254 Ill. 215, 98 N. E. 263; *Rosenblatt* v. *Weinman*, 225 Pa. 200, 74 Atl. 54; *Victoria Limestone Co.* v. *Hinton*, 156 Ky. 674, 161 S. W. 1109; *Carr, et al.* v. *Louisville & N. R. Co.*, 141 Ga. 219, 80 S. E. 716; *Santaella Co.* v. *Otto F. Lange & Co.*, 155 Fed. 719, 84 C. C. A. 143; *Ingram-Day Lumber Co.* v. *Rodgers*, 105 Miss. 244, 62 So. 230, 48 L. R. A. (N. S.) 435; *Briggs* v. *Morris*, 244 Pa. 139, 90 Atl. 532; *Erwin* v. *Erwin*, 25 Ala. 236; *Howard* v. *East Tenn. V. & G. Co.*, 91 Ala. 268, 8 South. 868; *Smith* v. *Crum Lynne Iron & Steel Co.*, 208 Pa. 462, 57 Atl. 953; *Burton* v. *Kinp*, 30 Mont. 275, 76 Pac. 563; *Woolsey* v. *Ryan*, 59 Kan. 601, 54 Pac. 664; *Darie, et al.* v. *Lumberman's Min. Co.*, 93 Mich. 491, 53 N. W. 625, 24 L. R. A. 357."

Sometimes where parties have entered into a definite contract, upon a lawful subject, based upon a present consideration, and no time is expressed, and time is not of the essence of the contract, performance may be tendered within a reasonable time. *Garland* v. *Hunter*, ... Okla. 201, 187 Pac. 466. But this contract is not of that class, because instead of merely failing to specify the time of performance, it does specify, but names the whole limitless future as the time. Moreover, far more than a reasonable time has elapsed. Twenty-one years have passed, with great changes, both economic and governmental. First came statehood, six years later, and then the policy of the state was expressed in the act approved May 11, 1908, Rev. L. Okla. 1910, Sec. 1432, imposing the whole cost of constructing railway crossings upon the railroads. Then in 1919 the policy of the state was again changed by placing the whole matter in the jurisdiction of the Corporation Commission, and permitting it to assess not to exceed half the cost of construction against the city.

In *City of Sapulpa* v. *Oklahoma Natural Gas Company*, 79 Okla. 196, 192 Pac. 224, the Supreme Court of Oklahoma, citing with approval from a Wisconsin case, said: "Statutes granting to cities the right to make long time contracts binding on the public fixing the rate to be charged by public service corporations, are not looked upon with favor and will be strictly construed."

Section 9 of ordinance void because extending beyond the term of municipal officers.

Again, we say that the ordinance, if it be regarded as a contract, is void, as being an attempt upon the part of the officials of the city in 1901 to bind all their successors in the exercise of governmental functions, which under all the authorities, they could not do. In 7 McQuillin, Municipal Corporations, Section 1254, it is said:

> "Respecting the binding effect of contracts extending beyond the terms of officers acting for the municipality, there exists a clear distinction in the judicial decisions between governmental and business of proprietary powers.
>
> "With respect to the former, their exercise is so limited that no action taken by the government body is binding upon its successors, whereas the latter is not subject to such limitation, and may be exercised in a way that will be binding upon the municipality after the board exercising the power shall have ceased to exist."

And in 8 Elliott on Contracts, Section 603, it is said:

> "As a general rule where the contract (of a municipal council or board) relates to governmental or legislative functions, especially if it involves the exercise of discretion, in that regard a municipal board has no power to make a contract extending beyond its own term so as to bind its successors and prevent them from exercising such functions whenever necessary or advisable."

Material portions of ordinance void because of penalties provided.

The sums stipulated to be paid for the crossing at Choctaw Avenue, in block 351 and at any other crossing

elsewhere located, are so manifestly excessive, disproportionate and arbitrary as to amount to nothing more than penalties, notwithstanding they are designated as stipulated and liquidated damages. In the ordinance the cost of the crossing at Cherokee Avenue, an underpass at a wider portion of the railway embankment (R. 43). is estimated at $7,500.00, constructed five or six years later at actual cost of only $8009.05, yet $20,000.00 is imposed as liquidated damages for the crossing at Choctaw Avenue; $15,000.00 for a crossing in Block 351, and $10,000.00 (in addition to the value of buildings and other railway improvements damaged or destroyed) for any other street or alley way (except Washington or Comanche Avenue) regardless of the location or character of any other such crossing, whether grade or otherwise, showing that the amounts were arbitrary and without regard to any actual damage estimated or which then could be estimated, and being greatly disproportionate, as the sum total of the costs of the crossings at Delaware, Grand and Cherokee was only $19,176.43, whereas the railway's estimated cost of the proposed underpass at Comanche Avenue is something in excess of $28,000.00 (R. 36, 43). The exorbitant sums exacted by the ordinance against a comparatively small municipality are on their face prohibitive and should be considered in determining whether or not these exactions are penal or compensatory. Thus it is said in 19 Amer. & Eng. Encyc. Law, 411:

> "It has been held that the magnitude of the stipulated sum should be regarded not only as com-

> pared with the value of the subject of the contract, but with reference to its proportion to the probable consequences of the breach. And where a stipulated sum is so great that it is apparent that the provision was inserted *in terrorem*, it will be held to be a penalty and not liquidated damages."

While the rule of this court formerly would scarcely admit the possibility of a valid contract providing for stipulated damages, yet that rule has been relaxed so that the court will determine for itself from the provisions of the contract whether or not the gross amounts fixed are in the nature of liquidated damages or penalties.

> *Sun Printing & Publishing Asso.* v. *William L. Moore*, 183 U. S. 642, 46 L. Ed. 366.
> *United States, Appt.* v. *Bethlehem Steel Company*, 205 U. S. 105, 51 L. Ed. 731.

When to the financial inability of the city, reflected in the necessity of spreading out the payment of its small share of the crossings then provided for through the draft on its tax resources for several years, is added the fact that the gross sums exacted for the opening of any future crossings, are merely for right of way damages which are in addition to the cost of construction (except as to Comanche and Washington Avenues) and besides the express inclusion "in addition thereto, of damages equal to the actual value of any buildings or other improvements of the railway company damaged or destroyed by the opening of any street or crossing," it requires no stretch of the imagination to say that actual experience in such matters makes clear that these large

sums are plainly prohibitive in their nature—"*in terrorem*" as the law has so aptly expressed it.

The further provision that these respective sums fixed as liquidated damages which are to prevail despite the actual damages which at the time of the taking may be assessed in the condemnation proceedings—a far more accurate criterion of the damages—would seem to clinch the conclusion that they are intended as penalties. If it were a case of work to be immediately done under the contract, or where time was of the essence, so that the parties could properly take into their estimation the probable damage, the actual damage being difficult or impossible of ascertainment, a different intent might be imputed, but where the circumstances exclude the possibility of the parties having taken any of the ordinary elements of damage into consideration, the idea of compensation is forbidden. The court will endeavor from the whole terms of the agreement and circumstances of the parties to determine whether such stipulations are penal in character.

Wise v. *United States*, 249 U. S. 361, 63 L. Ed. 647.

The provisions of the ordinance respecting future damages oust the jurisdiction of the courts and are void.

The latter part of Section 5 substituting the stipulations for damages in the ordinance in lieu of any "judgment, finding, verdict or assesment of damages by any court, jury, commission or other tribunal at the time having authority to assess such damages to the contrary notwithstanding," deprive the courts of the future

of their jurisdiction in condemnation proceedings. To attempt to provide by agreement for condemnation proceedings, and in the same breath sterilize the judgment, is self-contradictory and void upon its face.

> "Contracts by which the parties thereto seek to oust the jurisdiction of the courts and to deny the right of one or both to resort to any court of competent jurisdiction to settle questions of law that may arise thereunder, are declared void as against public policy. Courts guard with jealous eye any contract innovations upon their jurisdiction."
>
> Second Elliot on Contracts, Sec. 725.

Plaintiffs in error cannot consistently say in reply to this that no stipulated damages or penalties are provided in Section 9 with respect to Comanche Avenue, for the reason that they take the position that all of the sections are related and that the agreements contained in Section 9 and in the various other sections are not separable contracts, the considerations being mutually interdependent. If their proposition on this point is sound, then if any material provisions fail because of being void in law, the remaining ones must also fail. If their proposition is not sound, then there is no supporting consideration in the other provisions for Section 9 and it is unenforcible.

The test of consideration is here applied upon the determination of whether a valid contract exists, as of course, no consideration, however great or clearly expressed, could vitalize a contract which might be found in contravention of the police power.

II.

Even if the city ordinance be viewed as a contract such as alleged, such contract is void because beyond the power of the city to make and is a surrender of the police power.

The ordinance in question is undoubtedly within the functions of the police power. The plaintiffs in error so treat it and it is settled law that highway crossings come within the eminent domain or police power of the state. Thus in *New York & Eng. Ry. Co.* v. *Town of Bristol*, 151 U. S. 556, 38 L. Ed. 269, 272, it is said:

> "It must be admitted that the Act of June 19, 1889, is directed to the extinction of grade crossing as a menace to public safety, and that it is, therefore, within the exercise of the police power of the state."

And see also other cases hereinafter cited.

The city ordinance here involved does not present the case of a simple business contract such as suggested by plaintiffs in error, involving one single transaction such as found in most, if not all, of the cases cited in their brief. On the contrary the ordinance while dealing with certain matters incapable of reasonably immediate performance, is in large measure prospective, and comprehending matters which were not only not then performed or performable but executory in their nature and dependent entirely upon future conditions as to whether they would or could ever be performed. Their performance depended upon future needs and conditions, the necessity or propriety of which would depend upon future events and would call into exercise the

judgment and discretion of those who at such future time would be entrusted with the exercise of those police powers which are irrevocably reserved to the people.

The very nature of the things attempted to be done show upon their face that they could not be done. The ordinance undertakes to define the future highways running from east to west and thus provides a complete system or scheme of the highways passing to and fro from all of the east to all of the west half of the city, for as has been seen the Missouri, Kansas & Texas Railway Company is a median line dividing the city into two equal parts. It provides for the opening of four streets (with an alternative that Cherokee Avenue might be opened in consideration of the closing of Delaware Avenue) thus by agreement confining it to four streets and forever closing and vacating all other crossings then in use, thereby permanently fixing the east and west highways of the city. Whether it was upon these four streets that the principal dwellings or business houses should be located or along which the tides of traffic and commerce might wish to go, were questions which the subsequent development and shifting requirements and desires of future generations alone should determine. But under the scheme of highways laid out in the ordinance, the future needs of conveniences of subsequent generations or the positive necessities—the very things for which the police power was brought into existence—would be immaterial and helpless, for these things have already been fixed. It would seem to be manifest upon its face that the agreement that the crossings then in

use should be forever closed and never again be subjected to public use, is so palpably void that the mere statement of it is stronger than any argument could make it. There were certain other streets and avenues upon which no crossing had ever been opened by the public, such as Choctaw, Washington and Comanche Avenues, and others which are not enumerated except as they appear upon city maps introduced in evidence, and as to these, it was provided that they should never be opened except upon certain conditions and the payment of certain stipulated sums, thus making bargains for the future generations, and bargains which there was neither right nor power to make, and which might be burdensome beyond the ability of posterity to bear, for, if it is a matter about which a legal bargain can be made, who shall judge of the reasonableness or the unreasonableness of the terms? Such an agreement if valid would forestall all subsequent legislation and take away the benefit of any future law respecting crossings. As an illustration of this the sections of Mansfield's Digest of the Laws of Arkansas then in force and quoted by plaintiffs in error (Brief, 29-31) were quickly swept away by the advent of statehood and upon that event by the Act of May 11, 1908, Sess. L. Okl. 1907-1908, page 646, Revised Stat. Okl. 1432, it was made the duty of the railway company to construct the crossing at its sole expense, thus reversing Section 9 of the ordinance which required it to be at the city's sole expense. This act remained in force until the law was again changed by the Act of 1919 whereby the Corporation Commission is

given jurisdiction over the matter of crossings and is permitted in its discretion to assess a part not to exceed one-half the expense against the city. Yet by the contention of plaintiffs in error, Section 9 of the Ordinance of 1901, and not the legislation of the future state, must settle the whole question of the relation of the city and the railroad with respect to crossings and those matters of internal development which affect so vitally the life and growth of the city, depriving it of all of the benefits of future legislation, selling its birthright and putting it in swaddling clothes.

Then there was the Act of Congress of March 29, 1906, prior to statehood, consolidating the City of South McAlester and the Town of McAlester as a city of the first class under the name of McAlester, and in this connection we call to the court's attention the ratification of this in the suit of the *Missouri, Kansas & Texas Railway Company* v. *The City of McAlester,* wherein it sues the municipality by its new name and alleges that it is the successor and liable upon the Ordinance No. 74 (R. 53), the suit being filed in 1912, long after the act of consolidation, but it is manifest that with the inclusion of new territory by the consolidation of the two municipalities, the force and effect of any provisions as to the streets which might thereafter be opened, would be abrogated if they were ever of any validity.

As to Section 9 the police power is surrendered even as to the details of performance, leaving arbitrary terms to be imposed by the railway with reference not only to the crossing under the main track but as to such other

side tracks that might be hereafter established upon the grade of Comanche Avenue, meaning of course service tracks for the wholesale business district shown by the record to have grown up in that locality, and necessarily indefinite in number and all of which "shall be constructed upon plans and specifications to be approved by the said railway company," there being no limit as to the nature and extent of those plans and specifications. Under such requirement the railway company may prescribe all manner of requirements which in the judgment of the city or of a disinterested tribunal might not be necessary. That this is not mere conjecture is shown in the testimony of Mr. Z. G. Hopkins, (R. 34-45) a witness at the hearing before the Corporation Commission, who said he was the chief operating officer of the railway company and that from the investigation of the engineering department it would be necessary to lower all of their industry tracks east of the main line leading up to various wholesale concerns north of Delaware Avenue fronting on Main Street. That the railway company has a difficult grade situation and that the dump would have to be raised in order to permit the underpass and also broadened in order to provide for additional main tracks on the dump and the plans submitted included the cost of paving and guttering along the passageway, thus making it within the power of the railway company by the plans and specifications prescribed by it to correct its whole grade situation at that point in its line, to broaden its dump for additional main trackage and also to include paving which under the

paving law as construed by the state and Federal courts is a charge properly assessable against the railway company.

Choctaw Okl. & G. R. Co. v. *Mackey and City of Holdenville*, 256 U. S. 531.
M. K. & T. Ry. Co. v. *City of Eufaula*, 83 Okla. 263.

Yet if Section 9 is a valid and binding contract all of these matters as well as the entire cost is solely within the discretion and judgment of the railway company and the authorities of the city have no voice and the future laws themselves governing the matter are powerless. The city's estimate of this cost is vastly less because by a small depression (R. 44) in the surface of the underpass crossing and a small cost for drainage, there is no necessity whatever for elevation of the tracks nor reconstruction of the dump, notwithstanding these other things contended for by the railway would improve its own facilities and equipment.

The alleged contract is therefore void because it is a surrender of the police power involving matters so vitally affecting the safety, progress and social and industrial development of the city. In none of the many cases in this and other courts where municipal contracts have been held in violation of this principle and void is there to be found one which goes so far or is so flagrant as this. None have attempted to close by wholesale streets already in use or to limit or condition the opening of other streets never previously opened, or to say, as this ordinance does, that "the city further agrees that

it will hereafter open no other street crossings or alley ways" over a railway extending clear across the city, except upon the payment of certain arbitrary sums; or to say as Section 9 does "that if at any time in the future the city *shall desire* to open and establish a crossing over Comanche Avenue or Washington Avenue * * * it *may* do so upon the following terms," to be then dictated by the railway at the sole cost of the city, is in the very words used an abdication of the power. It plainly says so.

In *Galveston Wharf Co.* v. *City of Galveston*, 260 U. S. 473, 67 L. Ed. 355, there was a contract between the wharf company and the city by which it was provided that the ownership of certain property was to be inalienable except by a four-fifths vote of the qualified voters of the city. Under a certain amendment of its charter the city was about to take the property upon a majority vote and the wharf company undertook to enjoin the same upon the ground that it would impair the obligation of its contract and deprive the plaintiff of its property without due process of law, contrary to the Constitution of the United States; further alleging that it had made large expenditures to improve the property at its own cost, and the Supreme Court said:

> "Without going into greater detail we will assume that the alleged contract was made and bound the city, and that its terms will be departed from if the city should exercise the new power. The bill alleges that the proper officers will declare the amendments adopted, and that, unless restrained, the city 'will attempt to partition said property or

condemn the same, or both,' and prays for an injunction against attempting to enforce the amendments in any manner so far as the above-mentioned property is concerned. The case was heard upon the pleadings and documentary evidence, but it is unnecessary to state them further since the decree went upon the ground that the bill did not state a case within the jurisdiction of the court.

"We are of opinion that the decree was right. If the bill can be taken to allege sufficiently any threat and intent of the defendant, it does not show that the city will go beyond an exercise of the right of eminent domain. The allegation is, 'will attempt to partition or condemn.' If questions can be raised about the constitutionality of the ordinance authorizing partition, the city may confine itself to condemnation, and will, so far as appears. But there is nothing to prevent the exercise of eminent domain by the legislative power. *West River Bridge Co.* v. *Dix*, 6 How. 507, 12 L. Ed. 535; *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685, 41 L. Ed. 1165, 17 Sup. Ct. Rep. 718; *Pennsylvania Hospital* v. *Philadelphia*, 245 U. S. 20, 62 L. Ed. 124, 38 Sup. Ct. Rep. 35. These cases not only dispose of the objection based upon the contract, but also show the difference between an attempt to transfer property from one private person to another, and the taking it for public administration by a public body. 166 U. S. 694. There is no question about the principle, and therefore there is no substantial Federal question raised by the bill. This seems to us so plain that we have not thought it necessary to consider whether the suit was prematurely brought."

In *Northern P. R. Co.* v. *Minnesota ex rel. of Duluth*, 208 U. S. 583, 52 L. Ed. 630, the City of Duluth agreed with the railway company for the construction of a viaduct on Lake Avenue at their joint expense, the rail-

road at the time denying its obligation to build the viaduct, the contract further providing that the city should maintain the part of the bridge over the railroad's right of way for fifteen years and to perpetually maintain the approaches. The bridge was built at an expense of $23,000.00 to the city and $50,000.00 to the railroad company. Before the fifteen years had expired the viaduct having become dangerous for travel, the city under a power conferred on it by law that required railroad companies to construct bridges and viaducts at their own expense at public crossings, passed a resolution requiring the railroad company to immediately repair said viaduct and approaches in accordance with specifications adopted by the city, and a mandamus action was begun to require the railroad company to make the repairs. The contract was set up by the railroad company in defense with suitable allegations of violation of its constitutional rights by the impairment of the contract. In passing upon the case this court said:

> "This municipal action is more than a mere denial of the obligation of the contract; it affirmatively requires that certain improvements shall be made upon the viaduct by the railroad company which the council deemed to be necessary. It required legislative action to determine the nature and character of these improvements. The mandamus issued by the court is but the carrying of the ordinance into effect. If the contract was of binding force and effect it would relieve the railroad company from making such improvements within the right of way for the period of fifteen

> years, and permanently relieve it of other improvements upon the viaduct. To require that it shall make these improvements within the period named, as this *legislation does, is to require the railroad to* incur expenses for things which the city had expressly contracted to relieve it from during the period mentioned. Assuming, for jurisdictional purposes, that the company had a valid claim of contract, it was impaired by the legislation of the city in question; we therefore think there is jurisdiction in the case."

It was earnestly contended by the railroad company that "whatever the rule might be as to requiring a railroad company to construct such overhead bridges in the interest of public safety as to streets in existence when the railroad was built, it could not be required to do so when the roadway was contracted *after* the railway had acquired its right of way and laid its tracks." This court after reviewing the authorities and deciding against that contention further said with reference to the violation of the contract between the city and the railroad:

> "But it is alleged that at the time this contract was made with the railroad company it was at least doubtful as to what the rights of the parties were, and that the contract was a legitimate compromise between the parties, which ought to be carried out. But the exercise of the police power cannot be limited by contract for reasons of public policy; nor can it be destroyed by compromise; and it is immaterial upon what consideration the contracts rest, as it is beyond the authority of the state or the municipality to abrogate this power so necessary to the public safety. *Chicago, B. & Q. R. Co.* v. *Nebraska*, 170 U. S. 57, 42 L. Ed. 948, 18 Sup. Ct. Rep. 513."

A very similar contract was before this court in *Chicago, R. & Q. R. Co.* v. *Nebraska, ex rel. City of Omaha*, 170 U. S. 57, 42 L. Ed. 948, except that the contract between the city and the railway company for the construction of a viaduct along 11th Street by which the company was to pay three-fifths of the entire cost and the city the remainder, did not provide who was to maintain the viaduct after construction. ~~Consequently~~ Subsequently under another law of the State of Nebraska giving enlarged powers to cities of a population of 60,000 or more, the City of Omaha ordered the railway company to repair the bridge at its own cost in accordance with plans and specifications of the city and instituted mandamus proceedings to compel the same. When the case reached this court it was said:

> "No doubt the agreement of 1886 constituted a contract, in such a sense that the respective parties thereto continued to be bound by its provisions so long as the legislation, in virtue of which it was entered into, remained unchanged. While the agreement lasted its provisions defined the rights and duties of the city and the railroad companies. But was it a contract whose continuance and operation could not be affected or controlled by subsequent legislation?
>
> "Usually, where a contract, not contrary to public policy, has been entered into between parties competent to contract, it is not within the power of either party to withdraw from its terms without the consent of the other; and the obligation of such a contract is constitutionally protected from hostile legislation. Where, however, the respective parties are not private persons, dealing with matters and things in which the public has no concern, but are

persons or corporations whose rights and powers were created for public purposes, by legislative acts, and where the subject-matter of the contract is one which affects the safety and welfare of the public, other principles apply. Contracts of the latter description are held to be within the supervising power and control of the Legislature when exercised to protect the public safety, health, and morals, and that clause of the Federal Constitution which protects contracts from legislative action cannot in every case be successfully invoked. The presumption is that when such contracts are entered into it is with the knowledge that parties cannot, by making agreements on subjects involving the rights of the public, withdraw such subjects from the police power of the Legislature.

"We do not indeed, understand that these principles are questioned on behalf of the plaintiff in error. What is claimed is that the subject-matter of the contract in question does not fall within the range of the police power of the state. It is argued that 'while it may be true that a viaduct over railroad tracks located across a public street may be essential to the public safety, it does not follow that a legislative enactment impairing the obligation of an existing contract is necessary to secure its construction and maintenance, and that any attempt upon behalf of the state to establish a viaduct through such legislation, however necessary the viaduct itself may be to the public safety, would be an invasion of the Federal jurisdiction unless adopted under the compulsion of state necessity; that while it is not questioned that the maintenance of the viaduct is essential to the safety of the community, yet if existing contract obligations devolve this burden upon the city, the legislature of the state cannot, under the plea of public necessity pass a law imposing it upon the plaintiff in error, without bringing the act within the prohibitions of the federal constitution.' "

The railroad company contended that when the viaduct was constructed that it became a part of 11th Street and the city became bound, under its duty to maintain streets, to keep the viaduct in repair, whereas, the city contended that by the statute of Nebraska duty was cast upon the railroad to keep in good repair all bridges with their abutments.

With reference to this contention the court after observing that the parties in consideration of their mutual duty to the public having participated in the expense of the construction of the viaduct, there would seem to be a reasonable implication of a common obligation to keep it in repair, in other words an implied obligation under the contract that the city would bear part of the expense of the upkeep, and if so the city would be acting in disregard of its contract in requiring the railroad to repair the viaduct and approaches at its own expense. Continuing its opinion the court said:

> "However this may be, we think that, in view of the paramount duty of the legislature to secure the safety of the community at an important crossing within a populous city, it was and is within its power to supervise, control, and change such agreements as may be, from time to time, entered into between the city and the railroad company, in respect to such crossing, saving any rights previously vested. Any other view involves the proposition that it is competent for the city and the railroad company, by entering into an agreement between themselves, to withdraw the subject from the reach of the police power, and to substitute their views of the public necessities for those of the legislature.

> This subject has been so often considered by this court that it seems needless to here enlarge upon it. It is sufficient to cite a few of the cases. *Boston Beer Co.* v. *Massachusetts,* 97 U. S. 25 (24: 989); *Northwestern Fertilizing Co.* v. *Hyde Park,* 97 U. S. 659 (24:1036); *New Orleans Gaslight Co.* v. *Louisana Light Co.,* 115 U. S. 650 (29:516); *Mugler* v. *Kansas,* 123 U. S. 623 (31:205)."

In another case, that of *Contributors to the Pennsylvania Hospital* v. *City of Philadelphia,* 243 U. S. 20, 62 L. Ed. 124, there was an alleged contract between the state itself and the hospital which having been organized under the laws of Pennsylvania in 1841, segregated a tract of land in the City of Philadelphia for hospital for the insane and the legislature in 1854 upon the solicitation of the hospital passed a law specially forbidding the opening of any street or alley through the hospital grounds without the consent of the hospital authorities. The case arose upon the action of the city in opening a street through the hospital grounds in such way as not only to condemn the land desired for the streets but the rights of the contract of 1854. This court in affirming the judgment of the state Supreme Court said:

> "The conclusions of the court were sustained in a *per curiam* opinion pointing out that there was no question involved of impairing the contract contained in the act of 1854, since the express purpose of the city was to exert the power of eminent domain not only as to the land proposed to be taken, but as to the contract itself. The right to do both was upheld on the ground that the power of eminent domain was so inherently

governmental in character and so essential for the public welfare, that it was not susceptible of being abridged by agreement, and therefore the action of the city in exerting that power was not repugnant either to the state constitution or to the contract clause of the Constitution of the United States.

"It is apparent that the fundamental question, therefore, is, did the Constitution of the United States prevent the exertion of the right of eminent domain to provide for the street in question because of the binding effect of the contract previously made, excluding the right to open the street through the land without the consent of the hospital? We say this is the question, since, if the possibility were to be conceded that power existed to restrain by contract the further exercise by government of its right to exert eminent domain, it would be unthinkable that the existence of such right of contract could be rendered unavailing by directing proceedings in eminent domain against the contract, for this would be a mere evasion of the assumed power. On the other hand, if there can be no right to restrain by contract the power of eminent domain it must also of necessity follow that any contract by which it was sought to accomplish that result would be inefficacious for want of power. And these considerations bring us to weigh and decide the real and ultimate question: that is, the right to take the property by eminent domain, which embraces within itself, as the part is contained in the whole, any supposed right of contract limiting or restraining that authority.

"We are of opinion that the conclusions of the court below, in so far as they dealt with the contract clause of the Constitution of the United States, were clearly not repugnant to such clause. There can be now, in view of the many decisions of this court on the subject, no room for challeng-

ing the general proposition that the states cannot, by virtue of the contract clause, be held to have divested themselves by contract of the right to exert their governmental authority in matters which, from their very nature, so concern that authority that to restrain its exercise by contract would be a renunciation of power to legislate for the preservation of society or to secure the performance of essential governmental duties" (citing many decisions).

In *Georgia* v. *Chattanooga*, 264 U. S. 472, 68 L. Ed. 796, one of the late expressions of this court, it was said:

"The power of Tennessee, or of Chattanooga as its grantee, to take land for a street, is not impaired by the fact that a sister state owns the land for railroad purposes. Having acquired land in another state for the purpose of using it in a private capacity, Georgia can claim no sovereign immunity or privilege in respect of its expropriation. The terms on which Tennessee gave Georgia permission to acquire and use the land, and Georgia's acceptance, amount to consent that Georgia may be made a party to condemnation proceedings.

"The power of eminent domain is an attribute of sovereignty, and inheres in every independent state. *Mississippi & R. River Boom Co.* v. *Patterson*, 98 U. S. 403, 406, 25 L. Ed. 206, 207; *United States* v. *Jones*, 109 U. S. 513, 518, 27 L. Ed. 1015, 1017, 3 Sup. Ct. Rep. 546; *Shoemaker* v. *United States*, 147 U. S. 282, 300, 37 L. Ed. 170, 185, 13 Sup. Ct. Rep. 327; *Cincinnati* v. *Louisville & N. R. Co.*, 22 U. S. 390, 404, 56 L. Ed. 481, 485, 32 Sup. Ct. Rep. 267. The taking of private property for public use upon just compensation is so often necessary for the proper performance of governmental functions that the power is deemed to be

essential to the life of the state. It cannot be surrendered, and, if attempted to be contracted away, it may be resumed at will. *Pennsylvania Hospital* v. *Philadelphia,* 245 U. S. 20, 62 L. Ed. 124, 38 Sup. Ct. Rep. 35; *Galveston Wharf Co.* v. *Galveston,* 260 U. S. 473, 67 L. Ed. 355, 43 Sup. Ct. Rep. 168. It is superior to property rights (*Kohl* v. *United States,* 91 U. S. 367, 371, 23 L. Ed. 449, 451); and extends to all property within the jurisdiction of the state—to lands already devoted to railway use, as well as to other lands within the state (*United States* v. *Gettysburg Electric R. Co.,* 160 U. S. 668, 685, 40 L. Ed. 576, 582, 16 Sup. Ct. Rep. 427; *Adirondack R. Co.* v. *New York,* 176 U. S. 335, 346, 44 L. Ed. 492, 498, 20 Sup. Ct. Rep. 460)."

In the case of *State of Minnesota ex rel. St. Paul* v. *Minn. Transfer Ry. Co.* (Minn.), 50 L. R. A. 656, the City of St. Paul agreed with the company for the construction of an overhead bridge crossing over University Avenue, the city to construct all necessary approaches on both ends of the bridge and bear certain other expenses with certain restrictions inserted as to future uses by other railroads or motor lines, and the bridge was constructed at an expense of about $98,000.00 to the railway and of about $25,000.00 to the city. It was alleged by the railway company (and so found by the court) that it was much more of a structure than the railway company deemed necessary for public use at the time, but that it participated in the same, relying upon the good faith of the city that the city would thereafter maintain and repair the bridge at its own expense for all future time. And the city did there-

after maintain the bridge at its own expense, and the Supreme Court treated the case as being an agreement of the city to maintain the bridge "for all future time." Afterwards the city by an ordinance, required the railway company to repair the bridge in accordance with certain plans and proceedings prepared by it, and instituted mandamus proceedings to require the railway to do so, and had judgment which was sustained on appeal. We subjoin a copious quotation from the opinion, 50 L. R. A. 659:

> "While having under consideration defendant's claim of a grant of perpetual immunity from its otherwise binding obligation to keep the bridge in repair, we shall assume what is denied by the city attorney in his argument—that the city did enter, in so far as it could, into a contract with defendant corporation to build a part of this bridge as proposed by defendant's president, and that in this contract the city accepted and agreed to abide by the conditions contained in the proposition, hereinbefore quoted in full—one being that it was to maintain the structure 'for all future time'—and that the bridge in question was built and completed in strict compliance with a duly executed contract, in all matters of form. The question then is, was it within the power, express or implied, of the city officials to enter into an agreement of this character which would be of any validity? Not only did the council appropriate city funds to and in the construction of a bridge which, in so far as it crossed the railway tracks was made necessary by defendant's acts, and which, as a consequence, defendant was obliged to wholly construct, but it accepted conditions, and attempted to bind the municipality for all future time to maintain this bridge at that par-

ticular point. Without regard to what might be needed by the public at some future period, the council attempted to bind the city to repair and to keep in existence for all time a bridge but one-half as wide as the avenue across which defendant had laid a large number of tracks, evidently used as part of its transfer yard, and not merely for ordinary crossing purposes. The council went further than this. It attempted to bind the city not to cross the tracks at the surface grade or otherwise, nor to allow any street car or traction company so to do, or to so cross at any other grade than that fixed by the height of the bridge.

"If such a contract should be upheld, the city, without any consideration whatever, and as a gratuity, gave away and waived, as was said by the court below, 'a most valued right given to it at common law, viz., the right to compel the respondent to provide and forever maintain suitable and safe crossings on University Avenue over its tracks and other grounds, a distance of over 1,300 feet, and it relieved the respondant for all time from any and all obligations in that behalf.' Such an arrangement, ignoring entirely the question of consideration, was *ultra vires*. It was not binding on either party. It cannot be that the common council of 1888, by the passage of a resolution providing for the construction of a bridge 60 feet in width in a street 120 feet wide to be perpetually maintained by the city, could limit or control the legislative action of its successors, or could abdicate its right, as future necessity should require to compel the construction and maintenance of a bridge or viaduct of such dimensions, width, and construction as should, as nearly as may be, restore the street to its former condition of usefulness. We have already held that the power of municipal authorities to contract

in relation to a given matter does not carry with it by implication power to make a contract, even with reference to such matter, which shall cede away, control or embarrass their legislative or governmental powers, or render the municipality unable in the future to control any municipal matter over which it has legislative control (*Flynn* v. *Little Falls Electric & Water Co.*, 74 Minn, 186, 77 N. W. 38, 78 N. W. 106; *State ex rel. St. Paul* v. *St. Paul City R. Co.* (Minn.), 81 N. W. 200); and also that a municipal corporation intrusted with power of control over public streets cannot, by contract or otherwise, irrevocably surrender any part of such power, without the explicit consent of the legislature, because such power is in the nature of a trust held by the corporation for the state (*Nash* v. *Lowry*, 37 Minn. 261, 33 N. W. 787). And, of course, it is a general and fundamental principle of law that all persons contracting with a municipal corporation must, at their peril, inquire into the power of the corporation or its officers to make the contract. Future conditions may require that the public thoroughfare be restored to its normal condition, so that there may be a grade crossing for all persons who may have occasion to cross on foot or vehicles. This would compel the defendant's tracks to be put overhead or underneath the surface. And it is not improbable that in time the traveling public may need, for its use, the full width of the avenue, 120 feet, instead of the 60 feet now accorded. These things would be absolutely prohibited should we sustain defendant's contention. The alleged contract was and is invalid."

The alleged contract is impossible of ratification.

It is pressed in the brief of plaintiffs in error that the City of McAlester has continuously ratified the al-

leged contract. Relative to this contention we have already observed herein that the only acts of ratification alleged or shown in the record was the action of the city in paying its proportion of the expense of the construction of the crossings at Grand, Cherokee and Delaware Avenues in accordance with the agreement as shown by the resolutions of the city council of the City of McAlester subsequent to the consolidation of the City of South McAlester with the Town of McAlester under the Act of Congress and by the friendly suit brought against the new municipality in 1912, the railway company having advanced the costs for the execution of this part of the agreement, but it is a sufficient answer to this contention that if the ordinance or any part of it was void, ratification cannot impart vitality. Thus in *Newport* v. *Railway Co.*, 58 Ark. 270, the Town of Newport had made a contract with the Batesville & Brinkley Railway Co. to construct a levee on two sides of the town to protect it from overflow, and to pay the company therefor in warrants of the town $10,000, and the railway company was to have the privilege of using the levee as a road bed for its railway. One line of the levee was completed, accepted and paid for by the town, after which it refused to accept and pay for the other line of the levee, and the company having completed the levee according to the contract, brought the suit to recover a balance of $4480.00 alleged to be due on the contract. The answer of the town admitted its attempt to execute the contract, but says the contract was made for the purpose of inducing the railway company to locate

and construct its railway through the town and to establish a station there, and denies the power of the town to make the contract. In holding that the contract was *ultra vires* and that the railway company could not recover, the court, among other things, said:

> "Had the incorporated Town of Newport the power to make the contract which was the foundation of this suit?
>
> "In 1 Dillon, Mun. Corp., Sec. 89, it is said: 'It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.'
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> * * * * * * *
>
> "In *Minturn* v. *Larue*, 23 Howard, 435, the court said: 'It is a well settled rule of construction of grants by the legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the records of the act or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public.'
>
> * * * * * * *
>
> "Was the contract such as could be ratified by accepting the benefit of work done under it, or is the town estopped by permitting the work to be done under it and accepting the benefit of such work?

"In *Schumm* v. *Seymour*, 24 N. J. Eq. 144, it is said: 'It is a general and fundamental principle of law, that all persons contracting with a municipal corporation must, at their peril, inquire into the power of the corporation, or its officers, to make the contract. And a contract beyond the scope of the corporate powers is void.' 'The doctrine of equitable estoppel has no place in a case where usurped powers have been exercised by municipal officers, who, in so doing, were contravening public policy, as well as known positive law."

* * * * * * *

"Judge Dillon, in Sec. 463, 1 Dillon on Municipal Corporations, states the law in this behalf plainly and tersely, thus: 'A municipal corporation *may ratify* the unauthorized acts and contracts of its agents or officers, which are *within the scope of the corporate powers, but not otherwise.* * * * But a subsequent ratification cannot make valid an unlawful act without the scope of corporate authority. An absolute excess of authority by the officers of a corporation, in violation of law, cannot be upheld; and where the officers of such a body fail to pursue the requirements of a statutory enactment under which they are acting the corporation is not bound. In such cases the statute must be strictly followed; and a person who deals with a municipal body is obliged to see that its charter has been fully complied with; when this is not done, no subsequent act of the corporation can make an *ultra vires* contract effective.'

"As the contract sued on in this case was without the scope of the corporate powers of the incorporated Town of Newport, it could not be ratified, and the town was not estopped to deny its invalidity by having accepted and received the benefit of work done under it, with the knowledge and consent of the town."

This Arkansas case construing municipal contracts was decided under the provisions of Mansfield's Digest which governed in the City of South McAlester at the time of the passage of the ordinance. The same rule of construction prevails throughout the Oklahoma cases.

O'Neil Engineering Co. v. *Incorporated Town of Ryan, et al.*, 32 Okl. 738, 124 Pac. 19.

City of Enid, et al. v. *Warner-Quinlan Asphalt Co.*, 62 Okl. 139, 161 Pac. 1092.

Michael v. *City of Atoka*, 76 Okl. 266, 185 Pac. 96.

Hyde v. *City of Altus*, 92 Okl. 170, 218 Pac. 1081.

No Vested Rights Under the Alleged Contract.

Plaintiffs in error also urge that rights have vested whereby the provisions of Section 9 of the ordinance have been made valid. It would seem perfectly obvious that if the alleged contract which the railway company has interposed as a defense against the enforcement of the order of the Corporation Commission of Oklahoma, and the judgment of the Supreme Court of Oklahoma, was *ultra vires* and void that no rights have vested under it. How can there be a right vested or otherwise in a contract which is void? The decisions make clear that no consideration or anything can validate such an agreement; that the state itself cannot do so, and that railway companies and others in entering into such contract do so with full knowledge of their invalidity.

Estoppel Cannot Be Invoked.

The contention of plaintiffs in error that the city is estopped to dispute the validity of the contract does not

apply to a contract void under the police power. Nothing can save such a contract.

Newport v. *Railway Co.*, 58 Ark. 270.
Schumm v. *Seymour*, 24 N. J. Eq. 144.

The cases of *State, ex rel. City of Carthage* v. *Cowgill and Hill Mill Co.*, 55 (57) S. W. 1008; *First National Bank of Red Oak* v. *City of Emmetsburg*, 138 N. W. 451, cited by plaintiffs in error each related to executed contracts not affecting railway crossings or otherwise involving the police power, but were merely concerned with the ordinary control, supervision and upkeep of the streets and with all due deference have no application.

Discussion of authorities of plaintiff in error or ultra vires of contract under police power.

Plaintiff in error cites and quotes from *Louisiana Public Service Commission* v. *Morgan's Louisiana & Texas Railroad & Steamship Co.*, 264 U. S. 393, 68 L. Ed. 756. While there is a reference in the decision of this court to the contract made between the city and the railway company, we do not understand that the validity of the contract was the point immediately before the court or that its validity as tested under the police power was passed upon. On the contrary, as we read the case, the controlling question up for the court's decision, was whether or not the language of the Louisiana Constitution of 1921 and of the Act of 1918 adopted by reference in the 1921 Constitution, was sufficiently definite to convince the court that the Public Service Commission had thereby been given control over the

streets within the City of New Orleans, which was an ordinary governmental function of the City of New Orleans and that until the Supreme Court of Louisiana has placed such construction on the Louisiana Constitution and statute, which the court said had not been done in the case of *Gulf C. & S. F. R. Co.* v. *Louisiana Pub-Serv. Commission,* 151 La. 635, 92 Southern, 943, no such control had been bestowed upon the commission. Especially would such construction be adopted when the same would lead to a disregard of an existing contract, but we do not view the decision as holding that in case such power and control had been expressly given to the Public Service Commission that the contract would have been a sufficient defense against the enforcement of the law or that the contract would have been impaired thereby. This interpretation of the decision is ventured with all proper modesty but with the conviction that such is its effect and that it is not an authority of this court to the point that the contract was passed upon or upheld; but even if so it is further submitted that the ~~court~~ contract is so far from being analogous with the alleged contract in the instant case, that the court would not be inclined to apply it here.

The decision in the case of *City of Argentine* v. *Atchison T. & S. F. R. Co.,* 41 Pac. 946, related to the building of certain viaducts by the railway under an agreement that upon completion the City of Argentine would contribute and pay to the railway company $3,000.00 of the costs. The viaducts were built and installed in use and at a special election in the city bonds to

pay the $3000 claim of the railway company were voted and issued and taxes levied to pay the bonds and the sum of $3000 had been set apart and placed in the hands of the city treasurer. The city had statutory option and power to compel the railroad company to build the viaducts at its expense or to construct them at its own expense. Of the correctness of the decision holding that the city was liable under such circumstances to pay over to the railroad the $3000 is clear. The court expressly said, however, "it is unnecessary to determine the validity of the provisions as to future maintenance and upon that question we express no opinion." We cannot see, however, how the City of Argentine case is in point.

The case of *Hicks* v. *Chesapeake & O. Ry. Co.*, (Va.) 45 S. E. 888, was a suit against the railway company to recover damages for the negligent failure to keep in repair a certain bridge in the Town of Scottsville. The Town of Scottsville was not a party. Among the defenses set up was an ordinance of the town and a deed releasing the railway company's predecessor in title from any obligation to keep the bridge in repair and assuming such duty by the town. The consideration for such contract being the dedication by the railway to the town of the highway on which the bridge was located, which highway was accepted and after such dedication and acceptance the town itself erected the bridge in question. The town had never disavowed the arrangement and was not a party to the action and the case in our judgment, with all deference, is not in point.

The remaining case of *Florida East Coast Ry. Co.* v. *City of Miami,* (Fla.) 79 So. 682, turned upon the construction of the word "operate" occurring in an agreement between the city and the railway company, whereby it was provided that a crossing at 11th Street should be "put in, operated and maintained without expense" to the railway company. Where it was proposed to extend 11th Street across the railway, the company owned the land whereon it had not only its tracks and yards, but a part of the platform of the passenger station, and in order to remove the operations of the railway, the movement of locomotives and trains and switching of cars from close proximity to the business portion of the city, it entered into a contract with the railway by which it obtained the right to open 11th Street, whereupon the railway delivered to the city a deed of dedication for street purposes for extending the street across its right of way, removing its switching operations, station and tracks from the heart of the city to a point four or five miles distant, and the city constructed and thereafter maintained the crossing and employed a watchman at the crossing at the expense of the city. Subsequently, in order no doubt to relieve itself of the expense of a watchman, it passed an ordinance requiring all railway companies operating over streets in the city to provide and maintain safety gates at all street crossings. Two of the five judges dissented. The majority opinion while vindicating the principles that the police power cannot by contract be infringed upon, distinguished the case by saying that the City of Miami, in-

stead of abrogating, was on the contrary exercising its police power, and that the matter of who pays the expense did not determine that question.

The reasoning of the court, as an analysis will show, was based upon the proposition that "as long as the railroad owned the land and there was no street over it, it owed no duty and the city had no rights to be surrendered by the contract." The conception that there is no right to open crossings and charge the railway with the expense where the railway was constructed before the laying out of the street finds only small support in the United States and is in disagreement with the Supreme Court of the United States and of the State of Oklahoma, and with the majority rule in the United States as we will hereafter point out.

Northern Pac. Ry. Co. v. *Minnesota ex rel. Duluth,* 208 U. S. 583, 596, 52 L. Ed. 630, 636;

Chicago R. I. & P. Ry. Co. v. *Taylor,* 79 Okl. 142, 192 Pac. 349 (where the authorities are cited in great array).

Aside from this the facts of the Florida case so clearly distinguish it from the case at bar as to make it inapplicable. Had the Supreme Court of Florida been dealing with a city ordinance whereby all street crossings then in use in the City of Miami were forever closed and vacated and further providing that all other streets which ever thereafter at any time be opened except upon expressed conditions, terms and stipulated damages therein provided, "any judgment, finding, verdict or assessment of damages of any court, jury, com-

mission or other tribunal at the time having authority to assess such damages to the contrary notwithstanding and whether for more or less than the agreed sums" an altogether different case would have been presented and a different decision reached unless indeed the Florida court should follow to the utmost extent, the suggested theory that the police power did not extend to any crossing laid out after the railroad was built.

An examination of the case of *Hitchcock* v. *Galveston*, 96 U. S. 341, 24 L. Ed. 659, shows that the city was vested with full power of authority to grade, repair or otherwise improve the streets and to defray the cost of construction and incidental expense by the sale of a lot fronting on the improvement and vesting good title to the purchaser of the lot. The city being thus specifically invested with both the duty and the power to pave the street, entered into the contract and after the contractors had performed the material part of the contract and were going on in earnest to complete it, the city undertook to annul the contract and the contractors sued for damages. This was a case falling within the express powers of the city to pave the streets and an executed contract so far as the contractors were concerned, and as to the power of the city to make the contract this court said: "We spend no time in vindicating this proposition." The main controversy seemed to turn upon the provision for the issuance of bonds to pay for the work and the lower court held the contract inoperative because the city had agreed to pay for the work in bonds and it was held by the court that the issue of

such bonds was transgressive of the power of the city, but as this court observed, the suit was not brought upon the bonds.

We cannot see the applicability of the case of *Atlas Life Insurance Co.* v. *Board of Education, City of Tulsa,* .... Okl. ...., 200 Pac. 171, which involved the power of the Board of Education to execute a valid 99 year lease. The power to alienate or dispose of real or personal property having been conceded and the real estate in question having become unsuitable and not needed for school purposes, the Supreme Court of Oklahoma held that the power existed to execute the lease. We fail to perceive any similarity of question in that case and the case at bar.

The case of *Washington Water Power Co.* v. *City of Spokane,* (Wash.) 154 Pac. 329, deals with the method of payment for certain land purchased by the city for laying out a new street and the city having accepted the land and constructed the new street on it, the court held that it must pay. The contract related to a single transaction within the power of the city and wholly executed. We respectfully submit that the case is not in point.

The case of *Enid City Railway Co.* v. *City of Enid,* 43 Okl. 778, 144 Pac. 617, there was a contract whereby to induce the street railway company to construct its lines, a clause was inserted that it should only be required to pave 6½ inches on the outside of its tracks, and this was held to be valid notwithstanding a subsequent general statute requiring street railways to pave a larger space, but this was also an executed contract,

and in addition it was specifically pointed out in the case of *Chicago, Rock Island & Pacific Railway Co.* v. *Taylor*, 79 Okl. 142, 192 Pac. 349, where the Enid city case was relied upon, that the case did not involve the exercise of the police power of the state.

III.

The Railway Company not deprived of property with due process of law nor denied equal protection of the law by proposed crossing at Comanche Avenue.

The last contention of plaintiffs in error that by the proposed crossing at Comanche Avenue is deprivation of property without process of law and without compensation and is a denial of the equal protection of the law and that at the time the City of McAlester passed the Ordinance No. 74, that the city was not contracting away any existing police power, has been fully met and answered in the decisions of this court and of the Supreme Court of Oklahoma.

City of Cincinnati v. *Louisville & Nashville Railroad Co.*, 223 U. S. 390, 56 L. Ed. 481.

Northern Pacific Railway Co. v. *Minnesota, ex rel. City of Duluth*, 208 U. S. 583, 52 L. Ed. 630.

C. B. & Q. Railway Co. v. *Nebraska ex rel. City of Omaha*, 170 U. S. 57, 42 L. Ed. 948.

Coyle v. *Smith*, 221 U. S. 559, 55 L. Ed. 853.

Chicago, R. I. & P. Ry. Co. v. *Taylor*, 79 Okl. 142, 192 Pac. 349.

State of Georgia v. *City of Chattanooga*, .. U. S. .., 68 L. Ed. ...

Presumably plaintiffs in error rest this contention in part upon the proposition that by the Act of July 25,

1866, 14 Stat. 36, that the railway company has a fee title to its right of way. This claim is not conceded. In *Union Pacific Ry. Co.* v. *Kindred,* 43 Kans. 134, 23 Pac. 112, it was specifically held that under the grant of its right of way or easement from Congress that the company "does not own the fee." The materiality of this issue, however, is not perceived in the instant case as the Supreme Court of Oklahoma has specifically held with reference to this crossing that the right of way for Comanche Avenue must be taken by condemnation proceedings and compensation made before the crossing can be constructed and the question of title therefor, it is suggested, is immaterial except perhaps as to the amount of compensation to be determined in the condemnation.

The very ordinance in question concedes the power of condemnation existed at the date of the ordinance which was prior to statehood. In *City of Sapulpa* v. *Oklahoma Natural Gas Co.,* 79 Okl. 196, 192 Pac. 224, it was asserted that by virtue of the provisions of Mansfield's Digest that a gas franchise rate could not be changed subsequent to statehood without the consent of the City of Sapulpa. The contention was overruled and the court in passing upon the question said:

> "The status of towns within Indian Territory was stated by the Supreme Court of the United States in the case of *Farmers' & Mechanics' Savings Bank of Minneapolis* v. *Minnesota,* 232 U. S. 516, 34 Sup. Ct. 354, 58 L. Ed. 706, to be as follows:
>
> "'The Indian Territory was not made an "organized territory," but by Section 31 certain

> general laws of the State of Arkansas, as published in Mansfield's Digest (1884), were put in force there until Congress should otherwise provide; among these the chapter relating to municipal corporations (Secs. 722-959).' "

The court then quotes Sections 754 and 755 of Mansfield's Digest, and further said:

> "Upon Oklahoma becoming a state, and Sapulpa becoming a part thereof, the State of Oklahoma became substituted in place of the United States, and Sapulpa then became a governmental agency of the State of Oklahoma. The State of Oklahoma has authorized the Corporation Commission to regulate and fix the rates of public utilities within the state, and when the Corporation Commission and the owner of the franchise mutually agreed upon a different rate from that fixed by the franchise, the same became binding and of full force and effect."

The State of Oklahoma upon its admission into the Union came in with the whole of the police power unimpaired and existing in all its fullness for the people of the state. This principle is very clearly vindicated in the case of *Coyle* v. *Smith, et al., supra,* wherein this court laid down and luminously developed the proposition that Congress could not by the imposition of conditions, in an enabling act, deprive the new state of any of those attributes essential to its equality and dignity and power with other states.

It is true that the Act of Congress granting the easement or right of way to the predecessor in title of the Missouri, Kansas & Texas Railway Co. did not in

terms onerate it with any of the burdens of the cost of establishing crossings. Neither did the act exempt it from such burdens. It may be safely asserted under the many decisions of this court, that Congress could not have so exempted it. It is a universal principle underlying all of the decisions that the police power which this court has said is essential to the life of the state, is held in trust and can neither be bargained or granted away. It is as essential to the perpetuity of the state as the blood to the animal life. All persons, corporate or otherwise, ~~taking~~ and holding title to land subject to the exercise of this power, and in cases of railway companies by virtue of their peculiar relation, they take it subject to the requirement of uncompensated construction and maintenance of crossings over their lines in order that travel and intercourse from one section of the country to another may not be obstructed. When Congress granted the right of way in question it held the police power of the unorganized Indian Territory in trust for the state if it should be created or for the exercise by itself, for it was subsequently so exercised, for railroads which would be built. Congress could not divest this power out of itself nor out of any future state which might be erected in Indian Territory. As so frequently observed throughout the decisions of this court and all of the courts, railway companies when they accept their charter or right of way, accept them subject to the exercise of this right. It is immaterial whether the crossings be established or the burdens imposed before the railway is built or afterwards.

Speaking with reference to this proposition, this court in *Northern P. R. Co.* v. *Minnesota, ex rel. Duluth, supra,* 208 U. S. (583, 596) said:

> "As the Supreme Court of Minnesota points out in the opinion in 98 Minn. 380, above referred to, the state courts are not altogether agreed as to the right to compel railroads, without compensation, to construct and maintain suitable crossings at streets extended over its right of way, after the construction of the railroad. The great weight of state authority is in favor of such right. See cases cited in 98 Minn. 380.
>
> There can be no question as to the attitude of this court upon this question, as it has been uniformly held that the right to exercise the police power is a continuing one; that it cannot be contracted away, and that a requirement that a company or individual comply with reasonable police regulations without compensation is the legitimate exercise of the power, and not in violation of the constitutional inhibition against the impairment of the obligation of contracts. In *New York & N. E. R. Co.* v. *Bristol,* 151 U. S. 556, 567, 38 L. Ed. 269, 272, the doctrine was thus laid down by Chief Justice Fuller, speaking for the court:"

Again in City of *Cincinnati* v. *L. & N. R. Co.,* 223 U. S. 390, 56 L. Ed. 481, *supra,* this court said:

> "That the dedication in 1789, and acceptance by the then Town of Cincinnati, constitute a contract with the dedicators, obligatory upon the town and its successor, the City of Cincinnati, may be conceded. The contention is that the Ohio act of May 9, 1908, now Sec. 3283a, Revised Statutes of Ohio, is an impairment of the contract, forbidden by the 10th section of the first article of the Constitution of the United States. But the right of

every state to authorize the appropriation of every description of property for a public use is one of those inherent powers which belong to state governments, without which they could not perform their great functions * * * But the ordinance of 1787, as an instrument limiting the powers of government of the Northwest territory, and declaratory of certain fundamental principles which must find place in the organic law of states to be carved out of that territory, ceased to be in itself obligatory upon such states from and after their admission into the Union as states, except in so far as adopted by such states and made a part of the law thereof. This has been the view of this court, so often announced as to need no further argument. *Pollard* v. *Hagan*, 3 How. 212, 11 L. ed. 565; *Permoli* v. *New Orleans*, 3 How. 589, 11 L. ed. 739; *Escanaba & L. M. Transp. Co.* v. *Chicago*, 107 U. S. 678, 688, 27 L. ed. 442, 446, 2 Sup. Ct. Rep. 185.

"In the Escanaba & L. M. Transp. Co. case, it was said:

" 'Whatever the limitation upon her powers as a government whilst in a territorial condition, whether from the ordinance of 1787 or the legislation of Congress, it ceased to have any operative force, except as voluntarily adopted by her, after she became a state of the Union. On her admission she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original states. She was admitted, and could be admitted, only on the same footing with them. The language of the resolution admitting her is, "on an equal footing with the original states, all respects whatever," 3 Stat. at L. 536. Equality of constitutional rights and power is the condition of all the states of the Union, old and new. Illinois, therefore, as was well observed by counsel, could afterwards exer-

cise the same power over rivers within her limits that Delaware exercised over Black Bird Creek, and Pennsylvania over the Schuylkill River.'

"In *Coyle* v. *Smith*, 221 U. S. 559, 55 L. ed. 853, 31 Sup. Ct. Rep. 688, the case of *Escanaba & L. M. Transp. Co.* v. *Chicago*, and the cases cited therein, were fully reviewed and held applicable to conditions imposed by Congress in the enabling act under which Oklahoma was admitted, and all limitations in that act were held inoperative after admission, in so far as they had not been subsequently adopted by the state, and were in derogation of the equality in power of that state with the other states of the Union."

There are many other decisions of this court, most of which are cited in the opinion of the Supreme Court of Oklahoma in the case of *Chicago R. I. & P. Ry.* v. *Taylor*, 79 Okl. 142, from which a copious quotation is subjoined.

"Thus it will be seen that the state legislature onerated railroads with the duty of not only constructing crossings over the highways across that portion of its tracks and roadbed or right of way over which the public highway passed, but to 'maintain the same unobstructed, and in good condition for the use of the public, and to build and maintain in good condition all bridges and culverts that may be necessary on its right of way at such crossing.' * * * A franchise contract falls within the protection of Section 10, Art. 1, of the Federal Constitution, prohibiting states from impairing the obligations of a contract, and also within the protection of the fifth amendment to the Federal Constitution, prohibiting the taking of private property for public use without just compensation. Plaintiff in error contends that

under Section 9 of the Right of Way Act of Congress of March 2, 1887, the railway assumed no other burden with respect to highway crossings than the contractual obligation to 'construct and maintain continually all road and highway crossings and necessary bridges over said railway wherever said roads and highways do now or may hereafter cross said railway's right of way, or may be by the proper authorities laid out across the same'; and that therefore the act of the state legislature effective August 24, 1908, above quoted, violates the Federal Constitution in that it imposes upon the railway company the additional burden of maintaining the highway unobstructed and in good condition across the entire length of its right of way, instead of across that part of its right of way upon which its railroads were located.

"While not open to general use like streets and roads, railroads are public highways; they are *quasi* public institutions; the devotion of their property to the public use affects it with a public interest; and, while they are protected by constitutional limitations, they are peculiarly subject to be regulated by the state. These principles have been too long established to require the citation of authority. Article 9, especially Section 6 thereof, Williams' Oklahoma Constitution, is declaratory of these principles.

"Whether the railroad preceded or succeeded the construction of Watt Street, in El Reno, is not shown by the record, nor is it material. The obligation to construct and maintain safe crossings over streets and highways laid out before the construction of a railroad is imposed upon the railroad by the common law. *King* v. *Kent*, 13 East 220; *Boston & A. R. Co.* v. *City of Cambridge*, 159 Mass. 284, 34 N. E. 382; *Illinois Cent. R. Co.* v. *Copiah County*, 81 Miss. 685, 33 South. 502; *City of Bloomington* v. *Illinois Cent. R. Co.*,

154 Ill. 542, 39 N. E. 478; *Cleveland* v. *Augusta*, 102 Ga. 233, 29 S. E. 584, 43 L. R. A. 638; *Eyler* v. *Allegheny County*, 49 Md. 257, 33 Am. Rep. 249; *People ex rel. Bloomington* v. *Chicago & A. R. Co.*, 67 Ill. 118; *Dygert* v. *Schenck*, 23 Wend. (N. Y.) 446, 35 Am. Dec. 575; *Harriman* v. *Southern Ry. Co.*, 111 Tenn. 538, 82 S. W. 213; *State* v. *St. Paul, M. & M. Ry. Co.*, 35 Minn. 131, 28 N. W. 3, 59 Am. Rep. 313. * * * While some authorities (*Illinois Central R. R. Co.* v. *City of Bloomington*, 76 Ill. 447; *City of Bloomington* v. *Illinois Cent. R. R. Co.*, 154 Ill. 539, 39 N. E. 478), hold that the common law does not require a railroad company to maintain the highway laid out across its tracks after the construction of the railroad, it is firmly settled by the courts, in a long line of decisions, that the legislature, in the exercise of its police powers, may onerate railroad companies with the duty of maintaining crossings, although the street or highway was laid out subsequent to the construction of the railroad. *State* v. *St. Paul, M. & M. Ry Co.*, 98 Minn. 380, 28 L. R. A. (N. S.) 298, 124 Am. St. Rep. 581, 8 Ann. Cas. 1047, 8 Am. & Eng. Ann. Cases, 1047; *State* v. *St. Paul, M. & M. Ry. Co.*, 35 Minn. 131, 28 N. W. 3, 59 Am. Rep. 313; *City of Milwaukee* v. *Chicago, M. & St. P. Ry. Co.*, 168 Wis. 534, 171 N. W. 54; *State ex rel. St. Paul* v. *Minnesota Transfer Ry. Co.*, 80 Minn. 108, 83 N. W. 32, 50 L. R. A. 656; *City of Superior* v. *Roemer*, 154 Wis. 345, 141 N. W. 250; *New York & N. E. R. Co.* v. *Bristol*, 151 U. S. 556, 38 L. ed. 269; *C. B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 252, 41 L. ed. 979; *C. B. & Q. R. Co.* v. *Nebraska*, 170 U. S. 57, 42 L. ed. 948; *Northern Pacific Ry. Co.* v. *Duluth*, 208 U. S. 583, 52 L. ed. 630; *C. I. & W. Ry. Co.* v. *Connersville*, 218 U. S. 336, 54 L. ed. 1060, 20 Ann. Cas. 1206; *Chicago, M. & St. P. R. Co.* v. *Minneapolis*, 232 U. S. 430, 58 L. ed. 671. * * * In

the exercise of its police powers the state may require railroad corporations at their own expense not only to abolish grade crossings, but to build and maintain suitable bridges or viaducts to carry the street or highway across the railroad tracks. *Chicago, M. & St. Paul Ry.* v. *City of Minneapolis*, 232 U. S. 430, 34 Sup. Ct. 400, 58 L. ed. 671; *Erie R. Co.* v. *Board of Public Utility Comrs.*, 89 N. J. Law, 57, 98 Atl. 13; *Public Service Ry. Co.* v. *Board of Public Utility Comrs.*, 89 N. J. Law 24, 98 Atl. 28; *Armour & Co.* v. *New York, N. H. & H. R. Co.*, 41 R. I. 361, 103 Atl. 1031. The second section of the act of Congress of March 2, 1887, under which plaintiff in error claims, granted 'a right of way one hundred feet in width through said Indian Territory (that was before Oklahoma Territory was organized), and to take and use a strip of land two hundred feet in width, with a length of three thousand feet, in addition to right of way, for stations, for every ten miles of road, with the right to use such additional ground where there are heavy cuts or fills, as may be necessary for the construction and maintenance of the roadbed, not exceeding one hundred feet in width on each side of said right of way, or as much thereof as may be included in said cut or fill; provided, that no more than said addition of land shall be taken for any one station.' The plaintiff in error maintains a station in El Reno, and Watt Street crosses its tracks in its station grounds. If a railroad company is not protected by the Constitution from legislative acts burdening it with the duty of abolishing grade crossings, building and maintaining suitable bridges and viaducts at its own expense to carry a street or highway over its tracks and right of way, irrespective of whether such burdens were imposed by law at the time the company was incorporated or constructed, it is difficult to see how the act of the Oklahoma legis-

lature, effective August 24, 1908, onerating it with the duty of maintaining, unobstructed and in good condition for the use of the public, a highway clear across its entire right of way, impairs its contract or takes its property for public use without just compensation."

Plaintiffs in error adduce *Louisiana Public Service Commission* v. *Morgan's Louisiana etc. R. Co.*, 264 U. S. 393, that the Oklahoma Statutes are not broad or definite enough to authorize the order of the Oklahoma Corporation Commission. They do not point out wherein the Oklahoma Statutes are difficient in these respects. On the contrary the language appears to be comprehensive and explicit. Besides, the Supreme Court of Oklahoma has construed the particular law and held it applicable to the particular case at bar. It is unlike the decision of the Louisiana Supreme Court in *Gulf, C. & S. F. R. Co.* v. *Louisiana Pub. Serv. Commission*, 151 La. 635, 92 So. 143, wherein the court had held the Louisiana law applicable to the enforcement of an overhead crossing at the junction of a state highway with the railroad, and had nothing to do with municipal streets or crossings, and the state court's construction of the law did not in any way make the law applicable to matters pertaining to the "general control" of city streets or to municipal governmental functions, and therefore did not advise the Federal Supreme Court of the state court's construction of the statute in such respect.

It is therefore respectfully urged that the judgment of the Supreme Court of Oklahoma (*Missouri, K.*

& T. Ry. Co. v. *State of Oklahoma, et al.*, be affirmed or that a dismissal be entered herein of the writ of error. *Contributors to Penn. Hospital* v. *City of Philadelphia*, 245 U. S. 20, 24, 62 L. ed. 124, 128.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 205.—October Term, 1925.

Missouri, Kansas & Texas Railway Company and United States Fidelity and Guaranty Company, Plaintiffs in Error, *vs.* The State of Oklahoma and the City of McAlester, Oklahoma.	In Error to the Supreme Court of the State of Oklahoma.

[May 24, 1926.]

Mr. Justice Butler delivered the opinion of the Court.

The railroad of plaintiff in error runs through the city of McAlester, Oklahoma. At Comanche Avenue the main line is on a fill, and at least one industrial or sidetrack is on a lower level. In September, 1921, the city applied to the state Corporation Commission for an order requiring the railway company to provide at that place a pass under its tracks and a highway across its right of way. The commission ordered that the company prepare a plan and an estimate of quantities and cost for a reinforced concrete subway, having two openings of specified dimensions; that the plan show the location of industrial tracks, and that these tracks conform to the street grade; that the plan and estimate be filed with the mayor of the city and the Corporation Commission; and that if the company and the city failed to agree on an apportionment of cost of the underpass, the commission would hear evidence on that subject. The company was ordered to have the underpass constructed and open for traffic within 90 days after arrangement by the city to pay its portion of the cost. The company filed its petition in the supreme court to have the order set aside on the grounds, among others, that it is repugnant to the due process clause of the Fourteenth Amendment, and impairs the obligation of a contract in violation of section 10 of

Article I of the Constitution of the United States. The court affirmed the order (— Okla. —), and the case is here on writ of error. § 237, Judicial Code.

The line was built about 1873 on land granted by Congress to the company—then known as the Union Pacific Railroad Company, southern branch—for the construction of its railroad. Act of July 26, 1866, § 8, c. 270, 14 Stat. 289, 291. The city of South McAlester and the townsite of McAlester were laid out subsequently, pursuant to the Act of Congress of June 28, 1898, § 14, c. 517, 30 Stat. 495, 499. In platting these townsites, streets were laid out to the boundary line on each side of the land constituting the company's right of way. November 8, 1901, the city passed Ordinance No. 74. At that time there were a number of unauthorized crossings in use by the public; but the city had not acquired by purchase or condemnation the right of way for the extension of any street across the railroad. The ordinance was accepted by the company and is in form a contract. It provided for the immediate extension of certain platted streets across the right of way, tracks and station grounds of the company in lieu of the unauthorized crossings then in use. Some of the new crossings were to be constructed by the company at its own expense, and the cost of others was to be borne equally by the parties. Terms and conditions for the construction of other crossings were set forth in the ordinance. It was declared that thereafter the city would open no other street across the right of way and tracks of the company except upon payment of amounts specified in the ordinance as stipulated damages for a right of way across the railroad, any determination in condemnation proceedings instituted by the city, whether more or less than the agreed sum, to the contrary notwithstanding. It was stated that nothing contained in the ordinance should constitute a waiver of the company's right to contest the opening of additional streets. But there is no provision purporting to limit power or authority of the city to establish or regulate street crossings over, under or upon the tracks and other property of the company. And it was specifically agreed that, if at any time the city should desire to extend and open Comanche Avenue across the company's right of way and station grounds, the crossing should be constructed under the tracks located upon the fill and at grade across tracks laid at the

street level, according to plans and specifications approved by the company and at the sole cost and expense of the city. The company, for this and other considerations mentioned in the ordinance, agreed to waive all claims for damages caused by the opening and establishing of this crossing.

Pursuant to the Act of Congress of March 29, 1906, c. 1351, 34 Stat. 91, the city of McAlester was created by the consolidation of the city of South McAlester and the town of McAlester. In performance of the agreements contained in the ordinance, the city of McAlester in 1909 and again in 1912 assumed and paid portions of the cost of construction of some of the crossings covered by the ordinance. And ever since the consolidation it has been recognized and treated as the successor of the city of South McAlester and as a party to the contract. The present city is bound to the same extent as was its predecessor that passed the ordinance.

The court held that the state laws gave the commission full jurisdiction over all highways where they cross railways; that the commission had authority to order the crossing in question and to assess the cost of it against the city and the railway company, but not more than 50 per cent. against the city; that the company was the owner in fee of its right of way lands; that they could not be appropriated or damaged for public use without just compensation, and that the commission could not enforce obedience to its order to construct the grade crossing until the question of damage to the fee had been determined either by amicable settlement or by condemnation proceedings.

The order, as interpreted and affirmed, directly contravenes the provisions of the ordinance in respect of the Comanche Avenue crossing. It sets at naught the undertaking of the city to bear the cost of construction and the agreement of the company to give the city the right of way for the street crossing and to waive all claims for damages. The effect is to require the company forthwith to prepare the plan and estimate, and to direct the company—upon the determination of its just compensation and the consummation of arrangements by the city to pay the portion of the cost, if any, that may be imposed upon it—to proceed to construct the underpass and to have it open for traffic within the time specified. If a contract exists between the parties in respect of this crossing, it is

manifest that it would be impaired by the enforcement of the commission's order.

But defendants in error contend that the ordinance is void because it attempts to surrender police power; and therefore that there is no such contract.

It is elementary that for the safety and convenience of the public, the State, either directly or through its municipalities, may reasonably regulate the construction and use of highways where they cross railroads. The legitimate exertion of police power to that end does not violate the constitutional rights of railroad companies. They may be required at their own expense to construct bridges or viaducts whenever the elimination of grade crossings reasonably may be required, whether constructed before or after the building of the railroads. *Northern Pacific Railway* v. *Duluth*, 208 U. S. 583, 597; *Chi., Mil. & St. P. Ry.* v. *Minneapolis*, 232 U. S. 430, 438; *Mo. Pac. Ry.* v. *Omaha*, 235 U. S. 121, 127; *Erie R. R. Co.* v. *Public Utilities Comm'rs*, 254 U. S. 394, 409, 412. And such costs are not included in the just compensation which the railroad companies are entitled to receive. *Cincinnati, I. & W. Ry.* v. *Connersville*, 218 U. S. 336, 343; *Chi., Mil. & St. P. Ry.* v. *Minneapolis, supra*, 440. If the enforcement of its provisions operates to hamper the State's power reasonably to regulate the construction and use of the Comanche Avenue crossing, then undoubtedly the ordinance is void. *Chicago & Alton R. R.* v. *Tranbarger*, 238 U. S. 67, 76; *Atlantic Coast Line* v. *Goldsboro*, 232 U. S. 548, 558; *Denver & R. G. R. R. Co.* v. *Denver*, 250 U. S. 241, 244.

The precise question is whether the agreement of the city to bear the cost of construction is inconsistent with the proper exertion of the police power.

When the ordinance was passed, it was the purpose of the parties to get rid of unauthorized crossings then in use and to arrange for the extension of platted streets across the tracks and station grounds. It was necessary for the city to obtain rights of way for that purpose; and it was empowered to acquire them by contract, purchase or condemnation. §§ 11, 14, c. 517, 30 Stat. 498, 499; Mansfield's Digest of the Statutes of Arkansas (1884), §§ 749, 760, 907-912. It could not take them without making just compensation to the owner. The company owned its right of way lands and station grounds in fee. *Missouri, Kansas & Texas Ry.*

Co. v. *Roberts,* 152 U. S. 114. It was entitled to compensation for any of its property that might be taken or damaged by the construction and use of the crossings. *Chicago, Burlington, &c., R. R. Co.* v. *Chicago,* 166 U. S. 226, 251; *Cincinnati, I. & W. Ry.* v. *Connersville, supra.*

The ordinance did not purport to limit the number of crossings that might be opened. Retention by the company of the right to resort to litigation to determine whether the opening of additional streets across the railroad is reasonably necessary does not at all impinge upon police power. Quite independently of the ordinance, the opening and regulation of such crossings is subject to judicial scrutiny, and action that is arbitrary or capricious will be held invalid. *Denver & R. G. R. R. Co.* v. *Denver, supra,* 244. Indeed the reservation contemplates the exertion of the police power and plainly implies that the parties did not intend to restrict the authority of the city to open crossings.

The agreement of the city to pay the amounts stipulated for the opening of certain crossings does not involve or contemplate any surrender of the power of eminent domain. It was authorized to contract, purchase or condemn as it saw fit. The opinion of the state court rightly approves amicable settlement of the compensation to be given the owner. The parties were not bound to resort to litigation. It was competent for them in advance to settle the form and amount of compensation. The company's agreement to grant a right of way for the crossing was a valid consideration for the city's undertaking to bear the cost of construction.

This case is not like *Northern Pacific Railroad* v. *Duluth, supra,* cited by defendants in error. There the city had the right of way for the street, and a grade crossing existed for many years. The elimination of that crossing became necessary. The company refused to comply with the city's demands in that respect. Then a contract was made. The city agreed to build a bridge to carry the street over the railroad tracks and the company agreed to contribute $50,000 to its cost. The city undertook to maintain the bridge over the tracks for 15 years and to maintain the approaches perpetually. The city built the bridge at a cost of $23,000 in addition to the amount paid by the company. Years later, when repairs were needed, the company refused to make them. This court following the decision of the Minnesota supreme court (98

Minn. 429) held that the contract was without consideration, against public policy and void. The Northern Pacific Company gave up nothing. The city already had the right of way. The company might have been required to build the bridge. The contract relieved it of a part of the cost, and attempted for all time to suspend the proper exertion of the police power in respect of maintenance. The ordinance now before us is very different from the situation and contract considered in that case.

There is nothing in the ordinance that involves any attempt to interfere with or hinder the proper exertion of police power. Evidently it was the intention of the parties to make a permanent settlement in respect of the crossings covered by the ordinance. The city was empowered to open the Comanche Avenue crossing at any time without condemnation or other proceedings. Neither party could terminate the contract without the consent of the other. *Western Union Telegraph Co.* v. *Pennsylvania Co.*, 129 Fed. 849, 862. The city's agreement to bear the cost of construction of the Comanche Avenue crossing does not infringe the police power. The enforcement of the commission's order would deprive plaintiff in error of its property without due process of law and would impair the obligation of the contract in violation of the Constitution of the United States.

Judgment reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.